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Nos. 94-1494 and 94-1516

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-1494

ERPENBECK COMMERCIAL ENTERPRISES, INC.,

Petitioner,

v.

BOONE COUNTY FISCAL COURT, *et al.*,

Respondents.

No. 94-1516

ENTERPRISE VI, *et al.*,

Petitioners,

v.

BOONE COUNTY FISCAL COURT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Do Petitioners have a protected property interest in the only zoning application denied to support a Fifth Amendment taking and a Fourteenth Amendment due process claim pursuant to 42 U.S.C. §1983.

II. If so, do Respondents' actions constitute a Fifth Amendment taking and Fourteenth Amendment due process violation of that property interest.

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured and in an action at law, suit in equity, or other proper proceeding for redress.

Article 15 of the Boone County Zoning Regulations appearing in Petitioner, Erpenbeck Commercial Enterprises, Inc., Appendix, 53.

COUNTERSTATEMENT OF THE CASE

Petitioners, Erpenbeck Commercial Enterprises, Inc., (Erpenbeck) and Enterprise VI (Vesper), omit and misrepresent key facts supporting the Boone Circuit Court and Court of Appeals of Kentucky decisions. These undisputed facts which demonstrate federal questions and law were decided consistent with decisions of this Court. Nor is an unsettled question of federal law presented.

Petitioners had no constitutional protected right to the only zoning approval denied and the C-2/PD zoning classification does not violate the Constitution. Petitioners assert the same arguments as their prior Petition for a Writ of Certiorari (Case No. 94-939) denied on January 17, 1995. Respondents here are the government entities on which Respondents in Case No. 94-939 served as members.

On July 21, 1989, Erpenbeck contracted to purchase all or none of Vespers' 264 acres. That contract contained a protective contingency, but Erpenbeck waived that protection on November 6, 1989. (App. *Infra*, 1a). Prior to a public hearing on Petitioners' Article 15 application, Erpenbeck removed its protected contingency.

Failing to close on the 264 acres by February 1, 1990, Erpenbeck forfeited its $150,000.00 earnest money to Vesper. (Petitioner Erpenbeck App., 17, fn. 3).

Crucial to purchase of the 264 acres was Erpenbeck selling 43.45 acres of it to Hyper Shoppes, Inc., (Hyper), parent company of Biggs Hypermarket. Without that sale, Erpenbeck would not close on the 264 acres. Erpenbeck had no agreement with Hyper until August 17, 1989. Tha agreement was only an option, giving Hyper the right to terminate for any reason prior to February 28, 1990, or 30 days after Boone Fiscal Court approved a development plan under Article 15, whichever was later. Even if Boone Fiscal Court approved the Erpenbeck development plan, Hyper had the right to terminate for any reason. (Petitioner Erpenbeck App., 16, and App., *Infra,* 22a).

Prior to 1986 all 264 acres was zoned industrial. As part of a 1986 comprehensive plan and zoning regulation update, a portion was zoned C-2/PD. The 264 acres is on the north side of Kentucky State Route 18, two miles west of interstate highway I-75 and I-71. The 1986 C-2/PD zoning provided a transition area between large residential developments south of Kentucky State Route 18 and industrial uses to the north. It allowed over 200 different commercial and office uses at a clustered, non-regional intensity. This segment of the Kentucky 18 corridor contained several large, undeveloped tracts making it sensitive to large scale, regional retail developments. These developments attract high volumes of regional traffic. The C-2/PD zone allowed more varied uses than C-1 or C-2 zones for existing and growing residential population in western Boone County. Section 1514 (Petitioner Erpenbeck App., 63) permitted uses not listed in the underlying zone. It made commercial

and office uses available to residents without going to congested areas near the interstates I-75 and I-71. The PD overlay regulated intensity of the underlying uses. It provided protection from the larger scale regional retail uses extending down the Kentucky 18 corridor from I-75 and I-71. The C-2/PD zone coordinated development with infrastructure in an area identified as needing protection in the comprehensive plan. The Court of Appeals of Kentucky correctly found that the C-2/PD zoning expanded uses for the site. (Petitioner Erpenbeck App., 20).

This C-2/PD zoning implemented the 1986 comprehensive plan and its land use plan element. That plan recommended this segment of the Kentucky 18 corridor be commercially developed, but not for regionally oriented massive retail. Regional retail development generates high volumes of traffic and the comprehensive plan identified areas closer to the I-75 and I-71 interstate highway system as appropriate for those uses. Without a PD overlay as part of the zoning classification, C-2 zoning would have allowed massive regional oriented retail development, contrary to the comprehensive plan. Over half the 264 acres remained zoned industrial (I-1) without the extra layer of PD review. Over 40 industrial uses were available as a matter of right. Access to the I-1 property could occur through the C-2/PD zone without overlay review. The PD review was triggered only when C-2 uses were sought in the C-2/PD zone. (Petitioner Erpenbeck App., 28-29).

Petitioners applied for C-2/PD approval on November 1, 1989. The development plan comprised 43.45 acres, 34.8 acres were zoned C-2/PD and 9 acres industrial (I-1). It showed 417,600 square feet of regional retail space and 2,113 parking spaces, all needed for the

regional retail use. All the retail center's commercial shipping and receiving areas and some of the required 2,113 parking spaces, were located in the industrial zone. (Petitioner Erpenbeck App., 28). The proposed development required excavation of 10,800,000 cubic feet of ground and the parking spaces measured 422,600 square feet, not including driving aisles. Over 90% of the 43.45 acres was under roof or paved. This proposal was regional retail development on a grand scale. It did not comply with existing zoning, conflicted with the comprehensive plan, and could not have been approved as submitted.

Petitioners contend they were wrongly subjected to PD overlay review and only applied to mitigate damages and exhaust remedies. This groundless contention is refuted by Erpenbeck's contract with Hyper dated August 16, 1989. Section 5(a) recites approval of a Concept Development Plan is required pursuant to applicable zoning regulations. Section 5(c) is more explicit, providing:

> "Final approval of the Concept Development Plan will not be deemed to have occurred until the Concept Development Plan with conditions acceptable to Buyer (Hyper) is adopted by the Boone County Planning Commission and a corresponding ordinance is adopted by the Boone County Fiscal Court and the time for appeal pursuant to K.R.S. Section 100.347 has expired without an appeal being filed." (App., *Infra*, 10a-11a).

This contract predates Petitioners' application by over two months. Petitioners knew when contracting with Hyper that ministerial review for principally permitted uses of an unrestricted C-2 zone did not apply. They knew Boone Fiscal Court final action by passing an ordinance was required for C-2/PD approval.

Petitioners knew their development plan extended beyond the 34.8 acres zoned commercial. To meet the February 1, 1990, closing deadline under the Vesper contract, Erpenbeck sought to move the C-2/PD zoning line through a zoning administrator interpretation to include the 9 acres zoned industrial. The zoning administrator refused to move the zoning line and Erpenbeck appealed the the Board of Zoning Adjustment. They were proceeding before that Board as well as the Planning Commission at the same time. (Petitioner Erpenbeck App., 17, fn.2). Petitioners were not taken by surprise by new or unknown regulations. They were well aware of the C-2/PD zoning classification, its requirements, and location on the 264 acres. Erpenbeck has owned, developed and served as consultants for property zoned with a PD overlay. Adjacent to the subject 43.45 acres is a 5.5 acre parcel Erpenbeck proposed to use as access to the regional retail center. It had C-2/PD and C-3/PD zoning with an approved development plan for car dealerships. On January 29, 1993, Erpenbeck sold this 5.5 acres to Waco Oil Company, Inc., for $530,000.00. That development plan was amended through PD review for a McDonald's restaurant. (App., *Infra,* 27a).

Petitioners own other large parcels of land and sought map amendments to zones witha PD overlay. On January 18, 1995, the same Erpenbeck family members received a favorable recommendation for C-2/PD rezoning on a 466 acre site. (App., *Infra,* 31a-37a). Petitioners own actions decimate their argument that C-2/PD zoning on its face allows no uses and is worthless.

Petitioners urge their development plan should have been reviewed based on unrestricted C-2 zoning. This argument is based on zoning the property never had. (Petitioner Erpenbeck App., 16). If the C-2/PD had been instead unrestricted C-2, the project still extended com-

mercial retail facilities into an industrial zone. The project could not have been approved as a matter of right even if the 34.8 acres had been zoned C-2. The commercial intrusion into the I-1 zone is a zoning deviation. Without a PD overlay as part of the zoning classification, this zoning deviation could not have even been considered. (Petitioner Erpenbeck App., 59-60, Sec. 1506).

Petitioners' position the C-2/PD zone lacked standards is unsupported. Section 1504 requires a development plan before developing any property having a PD overlay as part of its zone. Minimum contents include transportation patterns, existing and proposed land uses and structures and relationship of the proposed development to the comprehensive plan, which includes its land use plan element. (Petitioner Erpenbeck App., 56).

Section 1506 (Petitioner Erpenbeck App., 59-60) requires the Planning Commission to apply certain standards in reviewing a proposed development based on facts presented at a public hearing. The Planning Commission must apply the following criteria to a proposed development plan:

(1) Consistency with Section 1500;

(2) Whether proposed development advances general welfare of the community and neighborhood; and

(3) Whether the proposed land uses, innovation of physical design, and the inter-relationship with the land uses in the surrounding area justify deviation from standard district regulations.

Section 1500 PD (Petitioner Erpenbeck App., 53-54) criteria for reviewing a development plan includes:

(1) A useful pattern of open space;

(2) A development pattern preserving and utilizing natural topography, trees and vegetation in ex-

change for development intensity elsewhere on site;

(3) Encourages cluster development as a more efficient use of land; and

(4) Development in harmony with land use density, transportation facilities, community facilities and objectives of the comprehensive plan.

The Planning Commission applied these standards and recommended the development plan be denied. A nine (9) page report listed reasons based on land use impacts, conflict with the comprehensive plan, excessive intensity of the development, traffic generation issues, land use incompatibility, and the development's extension into the industrial zone. (App., *Infra*, 38a-52a).

Petitioners did not challenge the Planning Commission's recommendation or any of its findings, but attended the Boone Fiscal Court meeting of February 6, 1990. Unknown to Respondents, Hyper had already terminated its agreement. The only C-2/PD project proposed no longer existed. Petitioners were aware Boone Fiscal Court could override the recommendation. Erpenbeck had consulted for other PD developments in which the Planning Commission recommendation had been overridden by the governmental legislative body.

Petitioners improperly inject subsequent approval for a Biggs Hypermarket elsewhere in Boone County. That approved site received a zoning map amendment nearly a year later containing many conditions making it compatible with the comprehensive plan. It abutted I-75 and I-71 and had access to three interstate interchanges. Among the zone change conditions, Biggs was not permitted to open until major road improvements were completed. No elected or appointed official of Respondents or any of

their staff steered Hyper to this or any other site. (App. *Infra,* 53a-60a, 63a-66a).

Petitioners blatantly misrepresent testimony of Bruce Ferguson, then Boone County Judge/Executive. He was the chief elected official of the County's legislative body. Petitioners' counsel acknowledged they were not seeking expert testimony from him. (Ferguson dep., pp. 4-7, 17 and 59-61). Judge Ferguson testified the C-2/PD zone allowed uses referenced by the underlying zone, subject to considerations of the extra layer of review through the PD process. Three times Judge Ferguson disagreed with Petitioners' comments that PD zoned property had no use. (Ferguson dep., pp. 27, 29-30, 49 and 66). Judge Ferguson simply testified that the many underlying C-2 uses would be subject to the PD overlay review on property zoned C-2/PD.

Petitioners' continued attack on Boone Circuit Judge Bamberger's Opinion is unjustified. Kentucky's Court of Appeals rejected this argument and the Supreme Court of Kentucky denied discretionary review. (Petitioner Erpenbeck App., 12 and 15). Petitioners first made this charge in a Motion to Alter, Amend and Vacate. Judge Bamberger issued a 3 page Order overruling, stating the Opinion and Order as entered "is this court's independent decision." Petitioners were asked to tender a proposed Opinion, made no objection, and submitted an opinion to Judge Bamberger. (App., *Infra,* 67a-69a).

Petitioners argue they have a federal constitutional right to unrestricted C-2 zoning. The unsoundness of this position is clear. It depends on zoning the property never had and Petitioners never sought through a zone change. Boone Fiscal Court rejected this zoning during three county wide zoning updates. Petitioners had no protected

property interest as a matter of right to a project that violated zoning and conflicted with the comprehensive plan.

REASONS FOR DENYING PETITION

Petitioners have shown no violation of any constitutional right. Instead, Petitioners ask this Court to employ the Constitution as a means to become a "federal super-legislative body" to oversee local government legislative zoning decisions. Respondents' C-2/PD zoning decision lawfully advanced legitimate government interests in regulating land use. This zoning accomplished this purpose without denying Petitioners' viable use. Respondents' actions do not constitute a Fifth Amendment taking or a Fourteenth Amendment due process violation.

Petitioners had no constitutional right or entitlement to the only C-2/PD approval sought. Nor does the Constitution mandate a rezoning to unrestricted C-2, a zone the property never had. Petitioners lack a legitimate protected property interest in the only application denied, which leaves their 42 U.S.C. §1983 claims unsupported.

ARGUMENT

I.

PETITIONERS LACK A PROTECTED PROPERTY INTEREST IN THE ONLY ZONING APPLICATION DENIED TO SUPPORT A FIFTH AMENDMENT TAKING AND A FOURTEENTH AMENDMENT DUE PROCESS CLAIM UNDER 42 U.S.C. §1983.

Petitioners had no constitutionally protected entitlement or justifiable expectation to development free of all regulation. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Since *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), land use has been subject to reasonable government regulation based on planning. Only where government goes too far or leaves the owner with no viable use is the Constitution violated. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

In *Nectow* zoning as applied left no practical use and *Mahon* found the Kohler Act solely regulated a private dispute. These regulations failed to advance a legitimate government interest, violating due process. In both instances, a clear protected entitlement or expectation was affected, which Petitioners lack.

Petitioners possessed a legitimate expectation to commercially develop that portion zoned commercial, subject to a development plan satisfying the criteria of the PD review. This process included a review for development intensity consistent with the comprehensive plan and existing or planned infrastructure. Petitioners had no legitimate entitlement as a matter of right to commercial development extending into the I-1 zone which failed to satisfy the limited discretionary C-2/PD procedure. Rather than overreaching, the C-2/PD and I-1 zoning promoted Petitioners' protected interest. It provided

zoning to enable Petitioners to develop property consistent with proper land use planning. Petitioners had no constitutional entitlement as a matter of right to development that deviated from existing zoning.

The Kentucky Court of Appeals properly relied on *Agins v. City of Tiburon*, 447 U.S. 255, 261-262 (1980). Petitioners misread *Agins* as based on ripeness. To the contrary, *Agins* holds as a matter of law that Tiburon's residential planned development overlay zone on its face did not violate the Fifth Amendment or Fourteenth Amendment. The overlay review regulated intensity of proposed development, just as the Respondents' C-2/PD zone. Facially, it denied no use and owners were free to pursue reasonable investment backed expectations by submitting development plans. The overlay zone in *Agins* advanced the same government interests of assuring careful and orderly development without excessive intensity and providing open space that the C-2/PD regulation promotes. See also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Regulations imposing a reasonable discretionary review process are facially neutral, denying no use. Existence of a permitting review system implies approval can occur. Accordingly, mere enactment of a discretionary regulation does not on its face violate due process or constitute a taking. *Keystone Bituminous Coal Ass'n. v. DeBenedictus*, 480 U.S. 470 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

The Constitution affords government the right to govern. No protected interest or expectation is lost facially to a discretionary review and approval process. There is no constitutional right to be free of all delay. *First English Evan. Luth. Ch. v. Los Angeles Cty.*, 482 U.S.

304, 321 (1987). Only where extraordinary regulatory delay results, leaving no viable use without advancing legitimate government interest has there been government overreaching. The C-2/PD regulation imposed no unusual delay and Petitioners never applied for commercial development approval confined to the commercial zone.

Petitioners wrongly rely on *Lucas v. South Carolina Coastal Council*, _____ U.S. _____, 112 S.Ct. 2886 (1992) to assert a protected property interest. David Lucas' beach lots when purchased were zoned and approved for development with no further discretionary review. South Carolina's Beachfront Management Act precluded all occupiable structures on either of these two lots, with no exception. Thereafter, the Act was amended to provide a special use process, but until then Mr. Lucas' constitutional investment backed expectations were denied. Petitioners never had unrestricted C-2 zoning and many alternative viable uses were available through the PD review process.

Lucas, supra, supports Respondents, holding no constitutional violation occurs when the proscribed use or activity was not part of Petitioners' protected expectations, title or ownership. Kentucky and other states have so applied *Lucas* in several cases involving discretionary regulatory approvals. *Ward v. Harding, Ky.*, 860 S.W. 2d 280 (1993); *Wheeler v. City of Wayzata*, 511 N.W. 2d 39 (Minn. 1994); *Dodd v. Hood River County*, 855 P.2d 608 (Or. 1993); *Comnty. Conc. Citizens v. Union Twp.*, 613 N.E.2d 580 (Oh. 1993); and *Kelly v. TRPA*, 855 P.2d 1027 (Nev. 1993), *cert. denied*, 114 S.Ct. 684 (1994). Two federal decisions reflecting a long line of cases applying this Court's precedent are *Silver v. Franklin Tp. Board of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1992) and *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th

Cir. 1994), *cert. denied*, 115 S.Ct. 193 (1994). Consistent with the state court decisions, these cases hold there is no constitutional legitimate claim of entitlement or justifiable expectation to discretionary permit approval. Both decisions uphold regulations requiring discretionary permit plan approval as constitutional. See also *RRI Realty Corp. v. Inc. Village of Southampton*, 870 F.2d 911 (2nd Cir. 1989) and *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989). Petitioners cite no authority recognizing a facially protected constitutional expectation as a matter of right to a discretionary regulatory zoning permit.

II.
RESPONDENTS' ACTIONS DO NOT CONSTITUTE A FIFTH AMENDMENT TAKING OR FOURTEENTH AMENDMENT DUE PROCESS VIOLATION.

Assuming a constitutional protected entitlement, Respondents' actions do not constitute a taking under the Fifth Amendment or a Fourteenth Amendment due process violation of that property interest. The C-2/PD zoning advanced a legitimate government interest and did not deny Petitioners all beneficial or productive use of the property, particularly when considering the entire 264 acres as a whole, as Petitioners did. Moreover, this regulation and denial of the only development plan submitted are not actions of undue interference of an arbitrary, capricious, or irrational character. It has a legitimate and appropriate relation to the government objective to be obtained through that regulation. *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

Kentucky law enables local government to enact zoning regulations based on a prior prepared comprehensive

plan. Chapter 100 of the Kentucky Revised Statutes is the enabling legislation for regulating land use. Authorized purposes of regulation are set forth in K.R.S. 100.201 and 100.203(1). These purposes include facilitating orderly and harmonious development, and regulating density of population and intensity of land use. Other purposes include protection of transportation facilities, particularly activities at or near transportation arteries. To accomplish these statutory purposes, local governments may enact special zoning districts pursuant to K.R.S. 100.203(1)(e). These are the very purposes underlying the need for the C-2/PD zoning within the Kentucky 18 corridor. Such zoning made available many uses not otherwise appropriate by regulating intensity through the PD review process. It advanced legitimate government interest of coordinating development with infrastructure and provided many alternative realistic uses.

Kentucky courts have interpreted the enabling legislation, recognizing that PD overlay zones are allowed. *Bellemeade Co. v. Priddle,* Ky., 503 S.W.2d 734 (1974) and *Danville-Boyle County v. Prall*, Ky., 840 S.W.2d 205 (1992) uphold identical standards and criteria as the challenged Article 15. When keyed to a comprehensive plan, discretionary overlay zones are valid exercises of the police zoning power and do not lack sufficient standards. To meet these standards, Petitioners could have scaled the project down to a less intensity, clustered the development to provide open space and afforded compatibility with adjacent residential development to the south and west. Lessened intensity would lower traffic generation and be consistent with the comprehensive plan.

Regulatory taking and due process analysis focuses on the purpose of the challenged regulation, whether it

advances a legitimate government interest, the economic impact, and what remains. The challenged C-2/PD regulation advanced government interests through implementation of the comprehensive plan while expanding available uses for the Kentucky 18 corridor. While Respondents denied Petitioners only application, that denial did not preclude all viable use, nor was it so intended. The January 3, 1990, Committee Report adopted by the Boone Fiscal Court concludes (App., *Infra*, 52a):

> "This site has many development possibilities, however, we do not believe that this is an appropriate use based on the information stated and for the reasons listed above. Further, we are of the opinion that this use could occur in Boone County if properly located."

Petitioners misapply *Dolan v. City of Tigard*, _____ U.S. _____, 114 S.Ct. 2309 (1994). There, local government exacted private property for a public purpose without showing any connection between the regulated development and the need for the exaction. Respondents imposed no condition amounting to an exaction. Petitioners proposed a development violating zoning and failing to conform to the comprehensive plan and other PD criteria. In *Dolan* the proposed use and its intensity was allowed as a matter of right.

Petitioners cite *City of Buford v. Ward*, 443 S.E.2d 279 (Ga. 1994) and *New Motor Vehicle Board of Ca. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). These decisions do not support Petitioners. In *City of Buford* due process and equal protection claims were dismissed as a matter of law for the very reason Petitioners fail here. Governmental denial of a permit did not violate a constitutionally protected right or entitlement. The same principle applied in *Orrin W. Fox Co.* as no protected liberty or

property interest was found to satisfy *Board of Regents v. Roth*, 408 U.S. 564 (1972). *Grayned v. City of Rockford*, 408 U.S. 104 (1972) upholds a noise ordinance as having sufficient standards. While its contents were flexible, what it prohibited as a whole was found constitutionally clear. For similar reasons, *Anderson v. City of Issaquah*, 851 P.2d 744 (1993), does not support Petitioners. This decision found invalid an architectural review regulation based on unwritten and undescribed "feeling" or "image" for development on a particular street. Decision makers were left with only their individual subjective feelings about what the image should be. The regulation was not keyed or referenced to any particular description in a comprehensive plan or similar land use study. Such is not the case with Article 15.

Article 15 standards and criteria reference specifically the comprehensive plan and other appropriate land use factors for this segment of the Kentucky 18 corridor. These standards and criteria provide that degree of ascertainability required in *Standard Mining and Development Corp. v. Auburn*, 510 P.2d 647 (1973), which is cited and distinguished in *Anderson*. In *Standard Mining* zoning regulations governing special discretionary use permits for gravel pit operations were challenged for lack of standards. Since a discretionary permit was required with a public hearing review process, standards keyed to the comprehensive plan were upheld. These flexible standards as part of a public hearing review with a right of appeal satisfied due process. The C-2/PD review required a public hearing and findings made from facts presented. Petitioners were afforded and availed themselves of the statutory appeal process under K.R.S. 100.347 as part of their Complaints and Amended Complaints in state court. (Petitioner Enterprise VI App., 33a and Petitioner Erpenbeck App., 37).

Petitioners also cite *Connally v. General Const. Co.*, 269 U.S. 385 (1926), challenging the Oklahoma minimum per diem wage statute. The state stature was found to be invalid for lack of certainty as to the rate of regulated wages and the locality to determine that rate. Unlike Oklahoma's statute, Article 15 contains sufficient standards and criteria for available uses. It also provides a procedure through a public hearing process to resolve any ambiguity. In *Kawaoka v. City of Aroyo Grande*, 17 F.3d 1227 (9th Cir. 1994), *cert. denied*, 115 S.Ct 193 (1994), standards nearly identical to Article 15 were upheld as a matter of law for a land use regulation requiring a specific development plan. Requiring a specific development plan was constitutional as a rational planning device to coordinate development with infrastructure where large undeveloped tracts were proposed for development.

Petitioners' position has no similarity to *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994). There, denial of the fill permit under wetlands legislation denied all use. Instead, *Tabb Lakes, LTD. v. U.S.*, 10 F.3d 796 (Fed. Cir. 1993) applies and requires denial of further review. Citing *Lucas, Agins*, and *First English*, supra, the Court of Appeals found a discretionary wetlands fill permit denial was not a constitutional violation. In support the Court of Appeals quoted *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985):

> "The mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. . . . A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense; After all, the very existence of a permit

system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. *Only when a permit is denied and the effect of the denial is to prevent "economic viable" use of the land in question can it be said that a taking has occurred."* (Emphasis added).

Kentucky's state courts correctly ruled as a matter of law that Petitioners were not entitled to relief. Then as now they could not sustain their burden of showing an entitlement to the only zoning approval denied. The C-2/PD regulation advanced legitimate government interest in land use planning and imposed no undue adverse economic impact on any protected investment backed expectation for the development as proposed. Nor can they show that Hyper would have purchased even if Boone Fiscal Court had approved the application. The record below is undisputed that Petitioners' development plan was not fully acceptable to Hyper. To make it more acceptable, the retail building had to be placed in the rear 9 acres zoned industrial. (App., *Infra,* 61a-66a; Petitioner Erpenbeck App. 29).

Other flaws fatal to Petitioners' 42 U.S.C. §1983 claims are ripeness and being time barred. Petitioners have not satisfied the "finality" prong of *Williamson Co. Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985). Without "finality" government decision making has not become a constitutional violation. Petitioners' facial claims assert the C-2/PD by its mere enactment violates their constitutional rights. The applicable statute of limitations for Petitioners' 42 U.S.C. §1983 claims is Kentucky's 1 year provision in K.R.S. 413.140(1)(a). *Wilson v. Garcia*, 471 U.S. 261 (1985) and *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179 (6th Cir. 1990).

In constitutional facial attacks, the statute of limitations commences immediately upon enactment. *National Advertising Co. v. City of Raliegh*, 947 F.2d 1158 (4th Cir. 1991) *cert. denied*, 112 S.Ct. 1997 (1992). Respondents enacted the C-2/PD zoning on Petitioners' property in 1986 and Petitioners participated in that county-wide zoning update. Petitioners commenced no action within the allowed time.

As part of the 1991-92 county-wide zoning update, that portion of Petitioners' property zoned C-2/PD was rezoned with no objection from Petitioners to C-4. This zoning classification allows over 30 commercial uses without PD review, with no user exceeding 100,000 square feet. Under either the C-2/PD or the current C-4 zoning, Petitioners' development plan could not be approved.

CONCLUSION

Respondents urge the Petitions for Certiorari be denied. Petitioners lacked a constitutionally protected property right to a development plan approval that violated existing zoning and conflicted with the comprehensive plan. They had no investment backed expectations for such a development. Petitioners present no special or important reasons giving rise to further review. Instead, Petitioners ask this Court to exercise a legislative function of local government. Simply stated, Petitioners' action depends on a zoning classification the property never had and presumes, without support, that

none of the hundreds of available uses would be approved. The Court of Appeals of Kentucky properly applied precedent of this Court and Petitioners present no unsettled question of federal law.

Respectfully submitted,

DALE T. WILSON
ROUSE, SKEES, WILSON & DILLON
7699 Ewing Boulevard
P.O. Box 756
Florence, Kentucky 41042-0756
(606) 371-7407

Counsel for Respondent,
Boone County
Planning Commission.

LARRY J. CRIGLER
6024 Rogers Lane
P.O. Box 169
Burlington, Kentucky 41005
(606) 586-9950

Counsel for Respondent,
Boone County
Fiscal Court.

APPENDIX A

BUSALD FUNK ZEVELY, P.S.C.

ATTORNEYS AND COUNSELORS AT LAW

226 MAIN STREET
FLORENCE, KENTUCKY 41042–6910
606/371-3600 · 606/371-2300
TELECOPIER 606/525-1040

November 6, 1989

Mr. Paul J. Vesper
Attorney at Law
8100 Burlington Pike
Suite 400
P.O Box 576
Florence, KY 41042

Mr. Dennis J. Vesper
Enterprise VI
709 St. Joseph Lane
Covington, KY 41011

RE: Burlington Pike Property

Dear Mr. Vesper:

Per paragraph (17) of the CONTRACT FOR PURCHASE AND SALE between Enterprise VI and Erpenbeck Commercial Enterprises, Inc., dated July 21, 1989, this is to confirm that my client's wish to waive the contingencies set out in paragraph 11(A) of same.

Should you have any questions, please do not hesitate to call.

Very truly yours,

BUSALD FUNK ZEVELY, P.S.C.

/s/ Thomas R. Nienaber
Thomas R. Nienaber

TRN:mjk
Certified Mail, Return Receipt Requested
cc: Erpenbeck Commercial Enterprises, Inc.
4205 Dixie Highway
Erlanger, KY 41018

APPENDIX B

REAL ESTATE PURCHASE AGREEMENT

THIS REAL ESTATE PURCHASE AGREEMENT (hereinafter referred to as "Agreement") is made and entered into by and between ERPENBECK COMMERCIAL ENTERPRISES, INC., a Kentucky corporation (hereinafter referred to as "Seller"), HYPER SHOPPES, INC., a Delaware corporation (hereinafter referred to as "Buyer"), and THOMAS R. NIENABER, as Escrow Agent (hereinafter referred to as "Escrow Agent").

W I T N E S S E T H:

WHEREAS, Seller does hereby agree to convey to Buyer, who agrees to purchase from Seller, a 41(±) acre tract of real estate lying and being located on Kentucky Highway 18, Florence, Boone County, Kentucky said property being more particularly described and identified below; and

WHEREAS, it is understood and acknowledged by Buyer and Seller that Seller herein has contracted with various third parties for the purchase of the 41(±) acre tract of real estate, in addition to other adjoining acreage; and

WHEREAS, Buyer and Seller acknowledge that Seller's contract to purchase the subject real estate with said third parties is subject only to obtaining certain zoning approvals; and

WHEREAS, Buyer and Seller desire to enter into this Agreement for the purchase of the Property, subject to the following terms and conditions.

NOW, THEREFORE, in consideration of the foregoing premises and mutual promises and undertakings hereinafter specified, the parties hereby covenant and agree as follows:

1. PROPERTY

(a) Seller agrees to convey to Buyer, who agrees to purchase from Seller, an approximate 41(±) acre treat of real estate, lying and being located at Kentucky Highway 18, Florence, Boone County, Kentucky, said 41(±) acre tract of real estate, being outlined on the attached plat, identified as Exhibit "A", a copy of which is incorporated herein by reference. Said 41(±) acre tract shall hereinafter be referred to as the "Property".

(b) Seller shall within 30 days from the date hereof obtain, at Seller's cost, a survey and legal description of the Property, prepared by a registered Kentucky surveyor, certified to Seller, Buyer and, if requested by Buyer, Buyer's title insurance company. Such survey shall stake all boundary corners and indicate the location of rights of ways and easements and indicate the acreage located within the Property as well as the acreage encumbered by rights of way or easements within the Property.

(c) Buildings, structures or improvements presently located on the Property and all crops, crop bases, tobacco poundage allotments, standing timber, residential or any type of farming structure, or any and all other types of standing crops of improvements shall not be included in the Purchase Price and any and all such structures, improvements, crops, etc. as herein before stated, shall remain the sole and separate property of Seller provided, however, that any and all buildings, structures, standing crops, timber, etc. as herein before stated, shall be removed from the Property by Seller at Seller's cost and

expense prior to Closing. Any and all such improvements, structures, crops, timber, etc. left on the Property at time of Closing shall become the property of Buyer.

2. PURCHASE PRICE

(a) The purchase price to be paid by Buyer to Seller for the Property (hereinafter referred to as "Purchase Price") shall be a sum equal to the product of $120,000.00 multiplied by the number of acres (calculated to the nearest 1/100 of an acre and based on the survey obtained pursuant to Paragraph 1 above) contained within the Property net of acreage encumbered by easements or rights of way of record.

(b) The Purchase Price shall be paid by the Buyer to the Seller at closing in cash or certified or cashier's check, less the amounts of Earnest Money paid by Buyer to Seller as provided for herein. Payment of the Purchase Price shall also be subject to the Escrow Provisions set out in Paragraph 6 hereof.

3. Earnest Money

(a) Buyer shall deposit the following earnest money deposits (the "Earnest Money"): (i) at the execution hereof, an initial Earnest Money deposit in the sum of Fifty Thousand Dollars ($50,000.00), (ii) thereafter Buyer shall pay additional Earnest Money of Ninety Thousand Dollars ($90,000.00), said sum being payable in six (6) equal installments of Fifteen Thousand Dollars ($15,000.00) each, the first of such installments to be payable on or before September 1, 1989 with a like Fifteen Thousand Dollar ($15,000.00) payment on the first day of each month thereafter, until the entire additional Earnest Money of Ninety Thousand Dollars ($90,000.00) is paid in full, (iii) In the event that Buyer elects to

extend the Closing beyond February 28, 1990, and the zoning approval under Paragraph 5 has not been obtained, then Buyer shall make the additional Earnest Money deposits provided in Paragraph 4(b), below. The additional deposits under this Paragraph 3(a)(iii) are to be applied to the Purchase Price at Closing.

(b) All Earnest Money shall be deposited by Buyer to Thomas R. Nienaber as Escrow Agent and shall be in an interest bearing Earnest Money account at Florence Deposit Bank, Florence, Kentucky.

(c) In the event this transaction should close as provided for herein, then and in such event, the principal amount of Earnest Money paid under Paragraph 3 (except payments made under Paragraph 3(a)(iii)), shall be applied to the Purchase Price with all interest accrued on such Earnest Money being paid to the Seller and not applied to the Purchase Price. In the event that this transaction shall not close as provided for herein, then all Earnest Money and accrued interest shall be disbursed as provided in Paragraphs 4, 5, 8, 12 and 15 hereof.

(d) Thomas R. Nienaber shall serve as Escrow Agent for purposes of investing and retaining all escrow moneys paid herein by Buyer to Seller. Escrow Agent shall make all disbursements as provided for in Paragraphs 4, 5, 8, 12 and 15 hereof.

4. CLOSING AND CLOSING DATE

(a) The Closing shall be held on or before the later of (i) February 28, 1990, or (ii) 30 days after zoning approval has been obtained under Paragraph 5, subject to Buyer's estension rights under Paragraph 4(b), below.

(b) In the event that the Closing should not occur before February 28, 1990, Buyer shall have the right to extend the Closing Date, in Buyer's sole discretion, on a month to month basis until the later of February 28, 1991 or 30 days after Seller has obtained the zoning approval under Paragraph 5. Should Buyer make such election or elections to extend the Closing Date, Buyer shall pay a sum of Twelve Thousand Five Hundred Dollars ($12,500.00) for each calendar month or any portion thereof that the Closing Date is extended. Such extension payments shall be applicable to the Purchase Price at Closing. All additional monthly payments shall be due and payable on or before the first day of each calendar month for which Buyer elects to extend. Such $12,500 extension payments shall be made directly to Seller and not to the Escrow Agent if the zoning approval under Paragraph 5 has been obtained at the time such extension payment is due. In the event that Seller should institute any litigation and/or appeal from action taken by either the Boone County Planning and Zoning Commission and/or the Boone Fiscal Court regarding the application for approval of Concept Development Plan as provided for herein, then the Buyer shall have the right to extend this agreement and the Closind Date by paying to Escrow Agent, as additional Earnest Money, on the first day of each calendar month during such period of litigation and/or appeal the sum of Twelve Thousand Five Hundred Dollars ($12,500.00). If the within transaction should close after favorable resolutionof such litigation and/or appeal, then all such $12,500.00 payments and interest thereon shall be applied to the purchase price. If such litigation and/or appeal is not resolved in favor of Seller and this transaction is not concluded, all $12,500.00 payments made by Buyer to Seller during that period of litigation and/or appeal, and any interest

thereon shall be returned to the Buyer. Seller shall not be under any obligation to institute an appeal or any other litigation resulting from any action taken by the Boone County Planning and Zoning Commission and/or the Boone Fiscal Court and any decision made relative thereto shall be made by Seller in Seller's sole judgment and discretion.

(c) In the event that Buyer should fail to exercise its right to terminate this Agreement on or before February 28, 1990 or such later date as provided for in Paragraph 15,(a) and this transaction does not close on or before February 28, 1991 due to default of Buyer, then and in such event, all Earnest Money and accrued interest thereon, and any and all other additional sums paid to extend the Closing Date, shall become the property of Seller, free and clear of all claims and demands, which sum shall be considered as partial damages with Seller being reserved any and all other causes of action at law or equity including, but not limited to specific performance as provided for under Kentucky law.

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(d) At Closing, all nondelinquent real property taxes apportioned to the Property shall be pro-rated between Seller and Buyer, said proration to be based upon the most recent available tax valuation information, as provided by the Boone County Property Valuation Administrator. Seller shall be responsible for any recoupment of real estate taxes pursuant to KRS §132.452 applicable to the period prior to the Closing Date as a result of any agricultural valuation of the Property under KRS §132.450.

(e) Within thirty (30) days from the Buyer's receipt of the survey required under Paragraph 2, Buyer shall obtain a title commitment for the Property and Buyer shall notify Seller in writing as to any and all exceptions

to title shown by such title commitment or survey to which Buyer objects including, but not limited to easements, assessments, restrictions, and any and all other matters of record. Seller shall remove or cure such objectionable title exceptions to Buyer's satisfaction within 60 days after receipt of Buyer's objections. In the event that no objection is made by Buyer to Seller, with respect to a matter shown by the title commitment or survey, Buyer shall be deemed to have waived such exception and shall take title to the Property subject to the same.

(f) At Closing, Buyer and Seller agree to execute and deliver any and all papers as may be legally necessary to carry out the terms of this Agreement, including, without limitation:

(i) A General Warranty Deed executed by Seller, conveying fee simple marketable record title to the Property to Buyer, free and clear of all tenants rights , liens, easements, reservations, restrictions and encumbrances whatsoever, excepting only such matters as are disclosed by the survey and/or the title commitment described above and which are not objected to by Buyer.

(ii) An Owner's Affidavit in form acceptable to Buyer's Title Insurer.

(iii) Such documentation as may be reasonably required by Buyer's Title Insurer to evidence Seller's authority to convey the property to Buyer.

5. ZONING APPROVAL

(a) Buyer and Seller acknowledge and understand that, Seller shall be required to obtain various certificates of

approval from the appropriate Planning and Zoning regulatory bodies in Boone County, Kentucky for a Concept Development Plan permitting the construction of an approximately three hundred thirty-seven thousand (337,000) square foot retail building on the Property. The term "Concept Development Plan", as provided for herein, shall be defined and interpreted pursuant to the current Planning and Zoning Regulations of Boone County, Kentucky. Seller agrees to act diligently and in good faith and take all reasonable steps necessary to obtain the approval of a Concept Development Plan by the appriate Planning and Zoning Authorities in Boone County, Kentucky on or before February 28, 1990. Buyer agrees to reasonably cooperate and assist Seller in all reasonable ways in obtaining Concept Development Plan approval from the appropriate Planning and Zoning authorities in Boone County, Kentucky.

(b) Buyer and Seller will cooperate in the development of the Concept Development Plan to be submitted. Buyer shall provide Seller with its preliminary site layout by September 1, 1989 and Seller will submit a Concept Development Plan for consideration of the Boone County Planning and Zoning Commission at its October 4, 1989 meeting. Changes to the submitted Concept Development Plan will not be made without the consent of Buyer.

(c) In the event that Seller is unable to obtain approval of the Concept Development Plan and Buyer elects to terminate this Agreement pursuant to Paragraph 15, then and in such event, all Earnest Money and the interest thereon shall be refunded pursuant to Paragraph 15 with Buyer and Seller having no further legal obligations to the other by virtue of the terms and conditions hereof except as provided in Paragraph 5(f) below. Final

approval of the Concept Development Plan will not be deemed to have occurred until the Concept Development Plan with conditions acceptable to Buyer is adopted by the Boone County Planning Commission and a corresponding ordinance is adopted by the Boone County Fiscal Court and the time for appeal pursuant to KRS Section 100.347 has expired without an appeal being filed. Seller will promptly notify Buyer of the date of expiration of the appeals period (and, therefore, the date deemed to be final approval hereunder) and evidence of the approval.

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(d) Buyer shall be responsible to Seller for the payment of all necessary and reasonable costs incurred by Seller in order to obtain approval of the Concept Development Plan, provided that Buyer's liability for such costs and expenses shall not exceed One Hundred Fifty Thousand Dollars ($150,000.00). Upon execution hereof, Buyer shall deposit with Seller the sum of Fifty Thousand Dollars ($50,000.00) as partial payment toward the costs and expenses incurred by Seller in obtaining Concept Development Plan approval. On or before the first day of each month during the term of this Agreement, Seller shall provide Buyer an itemized listing of all costs and expenses incurred by Seller in obtaining Concept Development Plan approval. At such time as Seller depletes the initial Fifty Thousand Dollar ($50,000.00) cost and expense deposit, Buyer shall forthwith deliver to Seller an additional Fifty Thousand Dollars ($50,000.00) for the payment of all subsequent costs and expenses incurred. At such time as the second Fifty Thousand Dollar ($50,000.00) deposit for costs and expenses is depleted, Buyer shall deliver to Seller the third and final Fifty Thousand Dollar ($50,000.00) deposit for costs. All cost and expense

funds remaining on deposit with Seller at such time as the Concept Development Plan is approved shall be delivered by Seller to Buyer with a complete accounting of all costs and expenses incurred. Seller need not obtain Buyer's approval prior to expending any and all sums for costs incurred in obtaining approval of the Concept Development Plan. It is agreed by Buyer that Seller shall be entitled to use Seller's reasonable judgment and discretion in determining what costs should be incurred in obtaining Concept Development Plan approval, and that such reasonable judgment and discretion shall be final and not subject to contest or objection by Buyer. Buyer shall be reserved the right to recommend to Seller any expenditures which Buyer deems appropriate and necessary to obtain Concept Development Plan approval; however, such suggestions and requests shall not be binding upon Seller. In the event that Planning and Zoning Commission denies the Concept Development Plan, the costs of a lawsuit or other legal action to overturn such decision will be at Seller's sole expense. Seller shall not be required to pursue any litigation and/or appeal of any action taken by the Boone County Planning and Zoning Commission and/or Boone Fiscal Court unless Seller deems it appropriate in Seller's sole judgment and discretion.

(e) All costs incurred by Seller in obtaining Concept Development Plan approval shall not be considered or act as a credit to any portion of any Earnest Money or Purchase Price to be paid by Buyer to Seller, not to any charge for extending the Closing as provided for herein.

(f) In the event that Seller is unable to obtain approval of the Concept Development Plan, Buyer shall not be entitled to reimbursement of any and all such costs

or expenses incurred by Seller in obtaining approval of the Concept Development Plan; however, Buyer shall be entitled to all plans, designs and other work product prepared in connection with the Concept Development Plan.

6. SITE GRADING AND IMPROVEMENTS

(a) Seller shall, at its sole cost and expense, provide all grading services for the Property to meet all specifications and standards of the Buyer (as set forth in attached Exhibit B) and all site grading plans and elevations as mutually agreed upon by Buyer and Seller. Buyer shall be responsible for providing at its sole cost and expense all engineering and related services necessary in preparing all plans, specifications and standards regarding site grading requirements necessary to meet those requirements of Buyer. Buyer and Seller agree that within forty five (45) days following the execution hereof, Buyer and Seller shall mutually agree upon a Site Grading Plan setting forth all site grading elevations. Buyer and Seller acknowledge that the appropriate Planning and Zoning Authorities may require various conditions relative to site grading and that Buyer and Seller shall, as is reasonably practical, cooperate with and accommodate any and all such conditions as may be required.

(b) Seller shall, at its sole cost and expense, construct up to the Southwest Property line (that property line fronting on Kentucky Highway 18) all water mains, sanitary sewer lines and utility services with capacity necessary to meet all existing Boone County and Commonwealth of Kentucky building code requirements for the proposed building and as may be required by the appropriate Planning and Zoning Authorities. Seller shall be responsible for any assessments or similar charges (other

than customary tap-in fees) in connection with the installation of such facilities In no event shall Seller be required to extend any water mains, sanitary sewer lines, or other utility services onto and/or across the Property. If any such extensions are required as a condition of the Concept Development Plan approval, then and in such event, Buyer shall agree to assume the cost of such lines serving improvements on the Property and Seller will be responsible for the costs of any extensions necessitated to serve tracts other than the Property.

(c) Seller shall, also construct the following streets and roadways at Seller's sole cost and expense: (i) proposed Centennial Circle (in accordance with the Improvement Plan for Heritage Hill Industrial Center) and in accordance with the construction standards and requirements of the local governmental jurisdiction for the dedication and acceptance of streets); (ii) a two-lane access road from the East side of the property to Centennial Circle (as shown on Exhibit A) in accordance with the construction standards and requirements of the local governmental jurisdiction for the dedication and acceptance of streets; (iii) proposed four-lane roadway from Kentucky 18 along the entire west boundary of the Property, as shown on Exhibit A, in accordance with the Construction Standards and requirements of the local governmental jurisdictions for the dedication and acceptance of streets. Seller will cause the proposed streets and roadways to be dedicated to and accepted by the local government jurisdiction and Seller will grant easements to Buyer to use such streets until such dedication and acceptance.

(d) Seller shall not be responsible for any improvements on the Property other than as provided for above. In the event that any turn lands, traffic signals or other road construction or road improvements are required by

Planning and Zoning authorities to obtain Concept Development Plan approval, the costs will be borne as provided in Paragraph 7.

(e) Upon Closing, Seller shall begin all site grading work and other improvements required to be undertaken by Seller under this Agreement and complete all such work in accordance with the construction schedule attached hereto as Exhibit C. All such work will be undertaken in a good and workmanlike manner, will be diligently pursued and will be free of liens or claims for liens. At Closing, the sum of Six Hundred Thousand Dollars ($600,000.00) shall be withheld from the Purchase Price to be held in Escrow with Thomas R. Nienaber as Escrow Agent. Escrow Agent shall disburse such funds from time to time as the site grading and other construction progresses based upon draw requests signed by Buyer and Seller. Buyer agrees to sign all draw requests upon receipt from Seller of evidence that (i) payments are due to contractors for such site grading or other construction, (ii) lien waivers have been obtained for the payments to be made and (iii) that sufficient funds remain in such escrow to complete the Seller's site grading and other construction obligations hereunder. When Seller and Buyer have certified that all such Seller's work has been completed, Escrow Agent shall pay any remaining escrow funds to Seller. All Escrow Money provided for under this paragraph shall be held at Florence Deposit Bank in an interest bearing account and all accrued interest on said Escrow Money shall be shared equally by Seller and Buyer. If Seller defaults in its construction obligations, Buyer shall be entitled to all undisbursed Escrow Money and all interest on the Escrow Money without prejudice to any other claims which Buyer may have against Seller arising out of such default.

7. PLANNING AND ZONING CONDITIONS

(a) Buyer acknowledges that the appropriate Planning and Zoning authorities may require various conditions as a condition precedent to approval of the submitted Concept Development Plan. In the event that any such "conditions" are required for approval of the Concept Development Plan, such conditions shall be subject to Buyer's consent, which will not be unreasonably withheld.

(b) If turn lanes, traffic signals or other road improvements to KY 18 are required by the Planning and Zoning Authorities to obtain Concept Development Plan approval, then Buyer shall pay for the cost of any improvements to that part of KY 18 along the frontage of the Property. In addition, if the Planning and Zoning Authorities should require any turn lanes or road improvements to KY 18 on the East side of Centennial Circle Drive, Buyer shall be required to pay the cost thereof. The Seller will pay or cause the Commonwealth of Kentucky to pay for the cost of turn lanes at the intersection of KY 18 and the proposed 4-lane road West of the Property. The cost of any traffic signals at KY 18 and the proposed 4-land road west of the Property will be shared equally by Buyer and Seller. The cost of the traffic signal at KY 18 and Centennial Circle Drive will be paid by Buyer. The cost of extension of the proposed 4-lane road to the West of the property site, detention and retention basins and other off-site improvements required by the Planning and Zoning Authority shall be at Seller's sole cost and expense and Seller agrees to construct same as part of its construction obligations under Paragraph 6. Seller shall only be required to pay that portion of the cost incurred relative to such improvements as are actually constructed off-site i.e. on that

portion of the real estate not actually included in the 41 acre (±) tract defined in Exhibit A. Buyer agrees that it shall be responsible for all construction costs of any and all other such improvements including the extension of the 4-lane road, detention and retention basins and any and other site improvements which are situated directly on the Property.

8. CONTINGENCIES; CONTRACT RIGHTS

(a) Buyer acknowledges that at the present time, Seller is under Contract with various third parties for the purchase of the Property and other property comprising a two hundred fifty-four (254) acre (±) tract of real estate lying and being located at Kentucky Highway 18, Florence, Boone County, Kentucky. Seller agrees to perform under such contract and to use best efforts, including taking legal action and seeking specific performance, to enforce its rights to purchase the Property. In the event that Seller defaults hereunder due to thru no fault of the Seller its inability to conclude its purchase of the Property, then all Earnest Money, all accrued interest thereon and all extension fees paid by Buyer to Seller ~~for zoning costs~~ shall be returned to Buyer. If such failure to conclude the purchase is due to Seller's default, then Buyer shall also be entitled to a return of all zoning costs paid to Seller and Buyer shall have such remedies against Seller as provided at law or in equity.

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(b) Seller represents and warrants to, and covenants with Buyer that:

(i) Seller has an executed contract to purchase the Property with the fee title owner of the Property; that no default has occurred thereunder, that the contract is contingent only upon obtaining the

zoning approval contemplated by Paragraph 5, hereof obtaining clear title to the Property and obtaining court approval of the sale of a minor's interest in said real estate, and that Buyer will make all payments, give all notices and take all other actions necessary or appropriate to keep such contract in effect.

(ii) Seller will not (and will not enter into any agreement to or permit the owner of the Property to) convey, encumber or restrict the Property without first obtaining the written consent of Buyer.

(iii) To the best knowledge of Seller, the Property is not subject to any liens (other than regular installments of real estate taxes and mortgages in an aggregate amount not more than one Purchase Price, assessments, leases, unrecorded easements, options to purchase (other than Seller's rights and this Agreement), rights of first refusal or any other agreement or contract to use, lease or purchase the Property.

(iv) to the best knowledge of Seller, the Property has not been used for the manufacture, distribution, storage or disposal of any hazardous waste, hazardous substance or other pollutant (as those terms are defined by any federal or Kentucky law, statute or regulation) and no such hazardous wastes, substances or pollutants are located on the Property.

(c) This Agreement is contingent upon Seller obtaining approval from the Boone County Planning and Zoning Commission of the Concept Development Plan as more particularly described in Paragraph 5. In the event that

this approval is not obtained for any reason other than the negligence or willful non-cooperation of either party, then, subject to Paragraph 4 and 15, hereof, this Contract shall become null and void with neither party having any obligation to the other than all Earnest Money shall be paid to the respective parties as provided for in Paragraphs 4 and 15.

9. POSSESSION

(a) Seller shall delivery to Buyer full and exclusive possession of the Property at Closing, subject only to Seller's right to enter the Property for the purpose of performing all Site Gradin Excavation, as provided for in Paragraph 6. Any crops, timber, structures, or other improvements on the Property not removed prior to Closing shall be deemed to be abandoned by Seller.

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(b) Within ~~30~~ 60 days from the date hereof, Seller will furnish Buyer, at Seller's sole cost and expense, with a report of an environmental engineer certifying that the Property is free of all hazardous wastes, substances or other pollutants.

(c) Seller grants to Buyer the right to enter into the Property (which right Seller has under its contract to purchase the Property) to conduct inspections, surveys and tests of the Property.

10. REAL ESTATE COMMISSION

Buyer and Seller acknowledge that neither has obtained nor retained the services of any real estate broker or real estate agent for which any real estate commission would be due and owing as a result of the real estate closing contemplated herein. Buyer and Seller agree to indemnify and hold the other harmless for any

real estate commissions so charged against the respective parties by virtue of any agreement or contract which they may have with any real estate broker or real estate agent.

11. NOTICES

Any notices which are permitted or required hereunder shall be in writing and shall be deemed to have been duly given as of the date and time the same are personally delivered, delivered by overnight delivery service; or deposited with United States Postal Service, postage prepaid, to be mailed by registered or certified United States Mail, return receipt requested and addressed to the following:

TO THE SELLER:	Erpenbeck Commercial Enterprises, Inc. Attn.: Mr. Ronald Erpenbeck 4205 Dixie Highway Elsemere, Kentucky 41018
TO THE BUYER:	Hyper Shoppes, Inc. Attn.: Mr. Pierre Wevers 4450 Eastgate Blvd. Cincinnati, Ohio 45245
TO ESCROW AGENT:	Thomas R. Nienaber, Esq. Busald Funk Zevely, P.S.C. 226 Main Street Florence, Kentucky 41042

or to such other address as either party hereto shall, from time to time, designate to the other party by Notice in writing as herein provided.

12. ESCROW AGENT

Thomas R. Nienaber joins in the execution of this Agreement for the express purpose of (a) acknowledging

receipt (subject to collection) of the Earnest Money deposit lodged by Buyer with Escrow Agent hereunder; and (b) agreeing to be bound by the provisions set forth in this Agreement with respect to the disbursement of the Earnest Money. Buyer and Seller hereby authorize the disbursement and delivery of the Earnest Money in accordance with the terms and provisions set forth in this Agreement. If, however, in the sole discretion of the Escrow Agent, some doubt exists as to when, whom or under what circumstances such Earnest Money shall be disbursed hereunder, and the parties hereto are unable after ten (10) prior written notice thereof from Escrow Agent to agree and direct Escrow Agent in writing as to when, whom or under what circumstances Escrow Agent shall disburse same, Escrow Agent shall be entitled to interplead said Earnest Money into the Boone Circuit Court without further liability or responsibility on its part. Costs, expenses and attorney fees incurred by Escrow Agent in connection with any such interpleader may be deducted by Escrow Agent from the amount of the Earnest Money prior to its deposit into the registry of the Court. In any event, however, all parties agree that Escrow Agent shall have no liability or any further responsibility to any party or person whomsoever for any disbursement of the Earnest Money made by Escrow Agent in good faith, unless such disbursement shall constitute a willful breach of the duties and obligations of Escrow Agent under this Agreement or gross negligence on the part of Escrow Agent. It is acknowledged by Buyer that the services of Thomas R. Nienaber rendered by him in his capacity as Escrow Agent shall not be construed as a conflict of interest and that Thomas R. Nienaber is in fact counsel for Seller herein. Buyer further acknowledges that the representation of Thomas R. Nienaber with respect to the Seller herein shall continue

after the closing hereof and that such continued representation shall not be construed as a conflict of interest by virtue of those services rendered as Escrow Agent.

13. TERM OF OFFER

This Agreement has been executed first by Seller as a continuing offer to sell the Property, subject to and conditioned upon the terms and conditions herein cotained, which offer shall be open for acceptance by Buyer until 6:00 o'clock p.m., August 20th , 1989, at which time the offer shall be deemed to be withdrawn. MP for PAW

14. AUTHORITY

Each of the undersigned hereby warrants and represents that he is authorized to execute this Agreement on behalf of the entity whose name he is signing under, and that his signature shall be binding upon such entity. Buyer and Seller acknowledge by the execution hereof, that all corporate action has been taken pursuant to and by duly authorized and adopted resolution of their respective Boards of Directors.

15. TERMINATION

(a) Buyer shall be reserved the option to terminate this Agreement for any reason, in Buyer's sole discretion and judgment, prior to the later of February 28, 1990 or 30 days after Seller has obtained the zoning approval pursuant to Paragraph 5.

(b) In the event that the Buyer should so elect to terminate this Agreement then:

(i) If Buyer elects to terminate this Agreement prior to February 28, 1990, and planning and zoning approval

for the submitted Concept Development Plan has not been obtained at the time of termination, then and in such event, Buyer shall be refunded all Earnest Money and accrued interest.

(ii) If Buyer should elect to terminate this Agreement after February 28, 1990 but prior to the time that Seller has obtained the zoning approval pursuant to Paragraph 5, then and in such event, Escrow Agent shall pay to Buyer all of the Earnest Money paid to date, with all accrued interest thereon.

(iii) If Buyer exercises this option to terminate and Seller has obtained the required zoning approval at the time of termination, then Escrow Agent shall pay to Seller and Seller shall be entitled to retain as its sole and separate property, all of the Earnest Money paid to date, with all accrued interest thereon.

(c) At the time of termination and distribution of the Earnest Money as provided for in Paragraph 15(a) and (b), this Contract shall become null and void with neither party having any further obligation to the other. All costs and expenses incurred by Seller in order to obtain approval of the Concept Development Plan shall not be reimbursed to Buyer by Seller; however, any all remaining moneys held by Seller to be applied to costs and expenses shall be immediately refunded to Buyer.

(d) In the event that Buyer should fail to terminate this contract as provided for in Paragraph 15(a) and planning and zoning approval under Paragraph 5 is obtained, Buyer shall be bound by the terms and conditions hereof and Seller shall be reserved any and all causes of action against Buyer including but not limited to retention of all Earnest Money and extension monies paid by Buyer to Seller plus all accrued interest; specific

performance; and any and all other causes of action as reserved Seller under Kentucky Law.

16. BINDING EFFECT

This Agreement shall be binding upon the respective parties, their successors, heirs and assigns. This contract may be assigned by the Seller or the Buyer provided that any such assignment will not release the parties of any liability hereunder.

17. GENERAL PROVISIONS

No failure of either party to exercise any power given hereunder or to assist upon strict compliance with any obligations specified herein, and no customer practice at variance with the terms hereof, shall constitute a waiver of either parties right to demand exact compliance with the remaining terms and conditions hereof. This Agreement contains the entire Agreement of the parties hereto and that no representations, inducements, promises or Agreements, oral or otherwise, between the parties not embodied herein, shall be of any force or effect. Any amendment to this Agreement shall not be binding upon the parties hereto unless the such amendment is in writing and executed by all the parties. The provisions of this Agreement inure to the benefit of, and be binding upon the respective parties, their heirs, administrators, executors, personal representatives, successors and assigns. Time is of the essence of this Agreement. This Agreement shall be interpreted under the laws of the Commonwealth of Kentucky.

Seller's election to retain any and all Earnest Money in the event of default by Buyer shall not act as or constitute a waiver of any and all other remedies available to Seller under Kentucky Law in the event of breach of this

Agreement by Buyer. The return of Earnest Money to Buyer in the event of default by Seller shall not act as or constitute a waiver of any and all other remedies available to Buyer under Kentucky Law in the event of breach of this Agreement by Seller.

18. SURVIVAL OF OBLIGATIONS

The covenants, representations and warranties set forth in this Contract shall survive any Closing under this Contract.

IN WITNESS WHEREOF, Seller has caused this Agreement to be executed by and through its president, Ronald Erpenbeck, pursuant to duly authorized and adopted resolution of its Board of Directors this ___ day of _____, 1989.

ERPENBECK COMMERCIAL ENTERPRISES, INC.

By /s/ Ronald Erpenbeck
Ronald Erpenbeck, President

Dated: 8/17/89

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF BOONE)

SUBSCRIBED, sworn to and acknowledged before me by the said Ronald Erpenbeck, President, Erpenbeck Commercial Enterprises, Inc., acting pursuant to duly authorized and adopted resolution of its Board of Directors this 17 day of August, 1989.

/s/
Notary Public

My Commission Expires: 5/25/91

IN WITNESS WHEREOF, Buyer has caused this Agreement to be executed by and through Pierre Albert Wevers, its Executive Vice President pursuant to duly authorized and adopted resolution of its Board of Directors this 17th day of August, 1989.

HYPER SHOPPES, INC.

By /s/

Dated: August 17, 1989

STATE OF Ohio)
) SS;
COUNTY OF Clermont)

SUBSCRIBED, sworn to and acknowledged before me by the said Pierr Albert Wevers, Executive Vice President of Hyper Shoppes, Inc. acting pursuant to duly authorized and adopted resolution of its Board of Directors this 17th day of August, 1989.

/s/ Janice K. Dean
Notary Public
My Commission Expires: 1-1-92

APPENDIX C

DEED

KNOW ALL PERSONS BY THIS INSTRUMENT:

That ERPENBECK COMMERCIAL ENTERPRISES, INC., a Kentucky Corporation,

the GRANTOR(S), for and in consideration of One ($1.00) Dollar and other good and valuable consideration as certified to below, paid to the GRANTOR(S) by the GRANTEE(S) herein, the receipt of which is hereby acknowledged, do(es) bargain, sell and convey to the following named GRANTEE(S),

WACO OIL COMPANY, INC., a Kentucky Corporation, its

successors and assigns forever, the following described real estate, in the county of BOONE, and state of KENTUCKY, to wit:

Street Address: Kentucky 18, Boone County, Kentucky

Grantee(s) Address: 119 Gerard Street, Covington, Kentucky 41011

Grantor(s) Address: 4205 Dixie Highway, Elsmere, Kentucky 41013

Z & S: _____ Group: 2026

Located in Boone County on the east side of Ky. 18 approximately 0.7 miles southeast of the intersection with Ky 237 and being more particularly described as follows:

Beginning at a point in the east right of way of Ky 18, said being 110 feet right of Station 158+78 and a corner with Lee Vesper, Trustee, thence with Vesper N 76-02 E. 1027.25 feet to a point; thence with a new division line S 13-58 E, 272.99 feet to

a point in the center of a proposed roadway; thence with the proposed centerline S 66-21-14 W, 131.72 feet to a P.C. of a curve; thence with the curve to the right 129.22 (R=300.00 delta = 24-40-46) to a point; thence N 88-58 W, 143.54 feet to a P.C. of a curve; thence with the durve to the left 130.91 feet (R=500.-- delta = 15-00) to a point; thence S 76-02 W. 163-47 feet to a P.C. of a curve; thence with the curve to the left 87.63 feet (R=125.00 delta = 40-10) to a point; thence S 35-52 W. 21.59 feet to a point on the east right of way of Ky 18; thence with said right of way N54-48-25 W. 368.00 feet to the point of beginning.

Containing 5.50 acres.

BEING the same property conveyed to the Grantors herein by deed from BARRY J. WILLIAMS and SERAFINA S. WILLIAMS, husband and wife, dated August 1, 1989, and recorded in Deed Book 418, page 266 of the records in the Boone County Clerk's Office at Burlington, Kentucky.

* * *

[Plat Map Omitted in Printing]

* * *

Together with all the privileges and appurtenances to the same belonging. To have and to hold forever the same to the GRANTEE(S), in the fashion and manner stated above in the conveying clause, with covenants of general warranty, except all taxes and assessments due and payable in the year 1993, which are to be reasonably prorated as of the date of closing and which the GRANTEE(S) assume(s) and agree(s) to pay.

GRANTOR and GRANTEE both certify, under oath, that the consideration of $530,000.00 is the full con-

sideration paid for the property and GRANTEE joins in this deed for the sole purpose of making this certificate about the consideration.

Dated this 29th day of January, 1993.

GRANTOR:

ERPENBECK COMMERCIAL ENTERPRISES, INC.,
a Kentucky Corporation

By: /s/ Ronald Erpenbeck
RONALD ERPENBECK, President

GRANTEE:

WACO OIL COMPANY, INC.,
a Kentucky Corporation

By: /s/ Dan Conrad Pres.
NAME AND TITLE

STATE OF KENTUCKY, COUNTY OF BOONE (GRANTOR)

The foregoing instrument was sworn to and acknowledged before me this 29th day of January, 1993, by RONALD ERPENBECK, President of ERPENBECK COMMERCIAL ENTERPRISES, INC., a Kentucky Corporation, for and on behalf of the Corporation.

/s/ Lori Jean Fields Lee
Notary Public
My commission expires: 6-25-93
My jurisdiction is: STATE AT LARGE

STATE OF KENTUCKY, COUNTY OF BOONE (GRANTEE)

The statement about consideration in the foregoing instrument was sworn to and acknowledged before me

this 29th day of January, 1993 by Dan Conrad, President of WACO OIL COMPANY, INC., a Kentucky Corporation, for and on behalf of the Corporation.

/s/ Lori Jean Fields Lee
Notary Public
My commission expires: 9-25-93
My jurisdiction is: STATE AT LARGE

This instrument prepared by Ziegler & Schneider, P.S.C., Attorneys at Law, 200 Covington Mutual Building, 629 Madison Avenue, Covington, Kentucky 41011, by Lori Jean Fields Lee, Attorney.

This conveyance has been authorized by Resolution of the Board of Directors of Grantor and the person(s) signing on behalf of Grantor have also been authorized to do so.

The Grantors herein hereby adopt the convenience plat attached hereto and incorporated herein by reference.

Subject to conditions, restrictions and easements contained in deeds and instruments of record.

STATE OF KENTUCKY,)
) Sct.
COUNTY OF BOONE,)

I, JERRY W. ROUSE, Clerk of the County Court in and for the county and state aforesaid, do hereby certify that the foregoing is a true and correct copy of the original on record in Deed Book, 501, Page 265-268 records of the Boone County Clerk's Office.

Given under my hand and official seal, this the 21 day of March, 1995.

JERRY W. ROUSE, Clerk
By: D. Lope, D.C.

APPENDIX D

BOONE COUNTY PLANNING COMMISSION
BUSINESS MEETING
Ellis Cooperative Extension Center
January 18, 1995
8:00 P.M.

Mr. William Viox, Chairman, called the meeting to order at 8:15 P.M.,

COMMISSION MEMBERS PRESENT:
Mrs. Judy Arnett
Mr. William Bailey
Mr. Fred Burch, Vice Chairman
Mr. Phil Damstrom
Mr. Robert Kirby, Jr.
Mr. Gayle McElroy
Mr. Don McMillian
Mr. Bob Millay
Mr. Barry Neltner
Mr. Robert Ries
Mr. Ralph Rush
Mrs. Linda Schaffer
Mrs. Carol Smith, Secretary/Treasurer
Mr. William Viox, Chairman
Mr. Earl White

All members were present.

LEGAL COUNSEL PRESENT:
Mr. Dale Wilson

STAFF MEMBERS PRESENT:
Mr. Kevin Costello, AICP, Executive Director
Ms. Jan Hancock, Secretary

Mr. Robert Jonas
Mr. Mitch Light
Mr. Kevin Wall

Approval of the Minutes:

Chairman Viox stated that each Commission member had received copies of the Minutes of the January 4, 1995 Public Hearings and Business Meeting. He asked if there were any comments or corrections.

There being no changes to the Minutes, Mr. McMillian moved that the Minutes be approved as mailed. Mrs. Smith seconded the motion and it carried unanimously.

UNFINISHED BUSINESS:

1. *Zoning Map Amendment*

   The request of *ERPS, Inc. (applicant)* for *ERPS, Inc., W. Thomas and Catherine Erpenbeck, Raymond and Carole Erpenbeck, Ronald and Patricia Erpenbeck, and Lawrence and Barbara Erpenbeck (owners)* for a Zoning Map Amendment on a 466-acre site located on both sides of U.S. 42 and on the north side of Mt. Zion Road, Florence and Union, Kentucky. The request is to rezone the site from Suburban Residential One (SR-1) to Residential Planned Development (RPD) and Commercial Two/Planned Development (C-2/PD) in order to allow a mixed use residential/commercial development, Plantation Pointe.

   Staff Member Kevin Wall read the Committee Report which recommended approval of the request based on the findings of fact, but subject to conditions (See Committee Report). Mr. Wall offered to review any of the changes in the project.

Mr. Barry Neltner, Committee Chairman, stated that it has taken quite a while to get to this point. He thanked Mr. Ray Erpenbeck for working with the Committee through the process.

Mr. McMillian asked if the new highway conflicts with the plan. Mr. Wall advised that it does not.

Chairman Viox asked if there were any comments from the applicant. Mr. Ray Erpenbeck stated that he appreciated working with the Committee. Chairman Viox thanked Mr. Erpenbeck for bringing the plan before the Commission. He stated that it is an excellent plan and he looks forward to Plantation Pointe.

Mr. Burch moved by resolution to the cities of Florence and Union to approve the request based on the Staff and Committee Reports including the conditions. Mr. Neltner seconded the motion.

Mrs. Schaffer stated that the Committee did a very good job. She questioned if the single-family attached, carriage homes, and condominiums are to be owner occupied. She does not want them to apply for multi-family, which could be four families that own. Mr. Ray Erpenbeck stated that the attached single-family residences and the carriage homes will be owner occupied. Mrs. Schaffer asked if this should be stated in the conditions. Mr. Wall replied "no". Mrs. Schaffer stated that it is important. Mr. Costello stated that it is implied in the application, all of the information submitted, and in the testimony. He stated that the apartments refer to the multi-family section only, which was discussed at length before the full Committee.

Counselor Wilson asked if the applicant would agree to submit a letter, to be included as part of the Devel-

opment Plan, stating that single-family attached and condominiums will be owner occupied. Mr. Erpenbeck replied "I will do that".

Mrs. Schaffer questioned if the project stops if some of the conditions do not occur. Counselor Wilson advised that, depending on the condition, that is probably correct. He noted that there is a condition that the road has to be all the way built thru before a Certificate of Occupancy can be issued. He stated that when a zone change is approved subject to a Concept Development Plan and a condition is not followed thru, the statutes say that the zone change is not lost and the property does not revert back to the prior zoning without having a Public Hearing to determine whether failure to meet that condition would cause that to happen.

Mr. Costello stated that with Oakbrook and Triple Crown, the conditions have been looked at as each phase comes on line, which will be done in this case. Mr. Wall reviewed Condition #16 in this regard.

Mrs. Schaffer referred to Condition #3 and questioned areas 11 A, B, and C. Mr. Wall indicated those three commercial areas on the plan. He stated that through the Committee review process, there was a general consensus that commercial uses should become much more limited in range of uses and intensity the further west they go. He stated that Mr. Erpenbeck divided Area 11, which is located along U.S. 42, into three areas (11 A, B and C) and prepared use lists (which are attached to the Committee Report). Mr. Burch stated that it was agreed that everything from the main road coming in on 11 B and C would be O-1 uses. Mr. Wall agreed and added that Area 12 was proposed to be generally C-2 uses, and Area 3 was to be

generally C-1 uses. He stated that Area 11 is normally what is included in C-2, with some exclusions. Area 3 is what is in C-1 with the exception that the intensity has been limited to 10,000 square feet per acre. Areas 11 B and C have been combined to allow O-1 uses for the area between the collector road and the western boundary of the site. Area 12 is a combination of C-1 and O-1 uses.

Mrs. Schaffer stated that it is not in the letter that 11 B and C will be O-1 uses. Mr. Wall referred to Condition #3 which indicates how the use lists apply. He stated that the Committee did not have a problem with the use lists and the concern was the parts of the project they were being applied to. Mrs. Schaffer stated that Condition 3. B. says that the allowed uses for Areas 11 B and 11 C "shall be exclusively those listed in the applicant's letter . . .". Mr. Wall stated that they are using the list, but putting the uses towards different parts of the development. He stated that the uses will be O-1 only.

Mr. Kirby noted Mrs. Schaffer's comments regarding the single-family and detached homes being something other than owner occupied, and that the applicant agreed to provide a letter stating that they would be owner occupied. He asked if an owner would be precluded from renting the home in the future while it was on the market for sale. Counselor Wilson explained that the owners would occupy the dwellings and not purchase them solely for investment purposes. Mr. Kirby stated that the restriction would apply to the first time the home is purchased. Counselor Wilson stated that that would be a fair answer to the question.

Mrs. Smith questioned the location of the land to be donated for the school. Mr. Erpenbeck indicated an area shown in orange on the plan. Mr. Neltner stated that there was a lot of discussion in regard to the school site. He stated that the depth of the commercial and office areas is approximately 400 feet and the way the ground lays, the school will have visibility from U.S. 42. Mrs. Smith stated that the visibility was her concern.

Mr. Ries stated that the Committee and Mr. Erpenbeck did an excellent job working together on this project and he commended them both.

There being no further comments, Chairman Viox asked for a vote on the motion made by Mr. Burch and it carried unanimously. Counselor Wilson advised interested parties to follow up with the Union and Florence city councils as they have the final say.

Mr. McElroy left the meeting at this time.

2. *Utilization of an Underlying Zone in a Planned Development*

The request of *Gary Gregory and Brad Denzia (applicants)* for *Matthias and Laverne Toebben (owners)* for the Utilization of an Underlying Zone in a Planned Development in order to construct an 8,800 sq. ft. AutoZone auto parts/accessory store on a 1.1-acre parcel located at Highway 42 and Old Toll Road, Florence, Kentucky. The site is zoned Commercial Two/Planned Development (C-2/PD).

Staff Member Bob Jonas read the Committee Report which recommended approval of the request based on the findings of fact, but subject to conditions (see Committee Report).

Mr. Kirby moved by resolution to the Florence City Council that the request be approved based on the Staff and Committee Reports. Mr. Bailey seconded the motion.

Mr. Ries stated that on the original plan the area in front of the dumpster was considered a loading area. He asked if it is still a loading area. Mr. Jonas advised that it is still a loading area, but shipping and receiving will be done after hours. Mr. Ries asked what it will look like. Mr. Jonas stated that it is a one-bay garage.

APPENDIX E

COMMITTEE REPORT

TO: Boone County Planning Commission

FROM: Barry Neltner, Chairman

DATE: January 3, 1990

RE: Request of *Erpenbeck Commercial Enterprises, Inc. (applicant)* for *Enterprise VI or Dennis Vesper and Alicia Vesper (owners)* for the Utilization of an Underlying Zone in Planned Development on a 43.45 acre site located on the north side of KY 18 and east of Limaburg Creek Road, Boone County, Kentucky. The site is currently zoned Commercial Two/Planned Development (C-2/PD). Boone Crossing, a 447,600 square foot retail center, is being proposed.

REMARKS:

We, the Committee, recommend denial of the request based upon the following statements and findings of fact.

FINDINGS OF FACT

CONCEPT DEVELOPMENT PLAN

1. The proposed uses and building density as stated on the submitted Concept Development is not consistent with Article 15 of the *Boone County Zoning Regulations* and the criteria used to evaluate Planned Development (PD) requests under the applicable regulations.

   a. The submitted Concept Development Plan, proposed uses and design are not innovative nor do they offer a mixed-use of a substantial value than

would be normally allowed under conventional zoning requirements as stated in the *Boone County zoning Regulations*.

The proposed uses and scale of development are not appropriate given the nature of the adjoining residential and small scale commercial land uses and zoning either existing or planned for the Florence-Burlington (KY 18) corridor. The proposed type and scale of commercial uses are not presently located along KY 18 from Houston Road to Burlington (the governmental center) nor are they proposed or planned for the future.

b. As stated in the *Boone County Zoning Regulations*, the Commercial Two (C-2) underlying zoning district serves as a reference point to determine permitted uses if the other requirements of Planned Development (PD) are met. The submitted plan and proposed uses and their intensities do not meet the other requirements stated in Article 15. These requirements include but are not limited to building dimensional standards, a more useful pattern of open space, a development pattern which utilizes the natural topography, a more efficient use of the land and a development pattern in harmony with land use densities, transportation facilities, community facilities and the objectives of the Comprehensive Plan.

c. The submitted Concept Development Plan does not demonstrate a development pattern which preserves and utilizes the natural topography, scenic vistas (KY 18 corridor), trees and prevents the disruption of natural drainage patterns as required in Planned Development (PD). The Plan is over 90 percent impervious cover, either building or pavement from parking, circulation or loading areas.

The submitted Concept Development Plan shows no landscaping features, or the retention of existing vegetation, to soften the tremendous visual impact of the paved parking area from public view (KY 18). To further illustrate this point, the submitted Concept Development Plan indicates only a 10 foot non-paved area between the KY 18 right-of-way and the interior ring road to screen the extremely large parking area located in front of the proposed retail center. In addition, due to the scale or size of the project and existing topography of the site, massive earthwork will be required to cut and fill the site. Consequently, the natural drainage system of the site will be disrupted and will be relocated off the site.

The proposed uses and location of the uses severely impact the site's physical assets. No attempt was made to rearrange the proposed uses to preserve the existing heavily wooded area on the site. The submitted request did not take into consideration the visual impact of the loss of this wooded area or the public view of the large parking areas in front of the retail center.

d. The proposed uses and submitted Plan do not fit the development pattern in harmony with land use density, transportation facilities, community facilities and objectives of the Comprehensive Plan. The applicant has indicated that the building intensity of the proposed project is 9,266 square feet per acre. This intensity was derived by combining the acreage of the C-2/PD zoned property and the I-1 zoned property. The correct building intensity is approximately 12,862 square feet per acre or 447,600 total square footage located on approxi-

mately 34.8 acres zoned C-2/PD. This figure is considered to be very intense in terms of the adjoining commercial uses. The Heritage Hill Industrial Center Subdivision was approved at an intensity of 6,447 square feet per acre.

e. The proposed development will have a tremendous impact on the existing roadway network (KY 18 and KY 237) extending from I-75 and I-275. The existing traffic volume on KY 18 at the site location is approximately 2,342 vehicles per hour at the P.M. Peak Hour, (from applicant's TIA, Figure 5) The total amount of traffic estimated to be generated by the development at full build out (again from the applicant's TIA, Table 3) is 2,929 trips. The amount of traffic generated by the proposed development compared to the existing traffic volume of KY 18 is significant. The traffic generated by the proposed development has the potential to double the existing amount of traffic on KY 18 during the most heavily traveled hours. This would greatly decrease the capacity of KY 18 which is needed for future development of Boone County. The intent of the Access Management Regulations is to ". . . permit reasonable speeds and economy of travel while maintaining the capacity of the roadway. . .". Overall, the submitted Concept Development does not demonstrate the combination of various land uses, innovation of physical design, and the inter-relationship with the land uses in the surrounding area to justify the deviation from standard district regulations.

BOONE COUNTY COMPREHENSIVE PLAN

2. The Proposed uses and submitted Plan are not in agreement with the 1989-1990 Goals and Objectives of the *Boone County Comprehensive Plan.*

Overall Objective

> "Residential, commercial, industrial and institutional uses can co-exist provided proper design principles are applied in developments to minimize frictions created by activities of whatever diversity."
>
> "The future growth and the redevelopment of areas shall be accompanied by adequate infrastructure and services."

Because of its scale and its expected impact on the community, the proposed development would require significant road and utility improvements in order to support the retail portion of this site. The applicant has failed to provide the assurance that these improvements will be made.

Environment

The project as proposed contradicts one of the Environment objectives of the Comprehensive Plan.

> "New development shall be designed in harmony with the physical environment in such a way that each site's existing physical assets are used beneficially."

Due to the scale of the project, the site's assets (e.g. trees, drainage swales, and existing topography) will have to be completely removed including the possible the Silvery Salamander and the Running Buffalo Clover.

Business Activity

> "Appropriate locations for industries or businesses compatible with others located in Boone County are provided."

The scale of the proposed use conflicts with adjoining smaller scale and less intense commercial uses and existing businesses located along KY 18. The Committee believes there are other more appropriate locations in Boone County for the proposed regional development as stated in the Comprehensive Plan.

The proposed project also conflicts with a commercial objective of the Business Activity Element. Large scale mixing of commercial and non-commercial uses shall occur in Planned Developments only when consideration can be given to assure compatibility with surrounding land uses. The proposed design of the commercial center suggests only large scale retail uses instead of providing professional office and service related uses needed for the nearby residential population and the eventual industrial development located directly north of the site.

Transportation

The applicant has not adequately addressed the traffic impact the proposed project will have on the existing transportation network in Boone County. Specifically, the transportation concerns raised at the Public Hearing relating to a increase in the number of traffic accidents along KY 18, and a decrease in the level of service at intersections have not been resolved. The Comprehensive Plan discusses the need for access management and to protect the traffic capacity of major roads like KY 18 in Boone County.

3. The proposed uses and submitted Plan are not in agreement with the 1986 *Boone County Comprehensive Plan.*

   a. The Comprehensive Plan describes areas of future commercial activity. The primary focus of commercial activity is and will remain in the future in Florence. The City of Florence, because its location to the interstate road system and access is well suited for the expansion and the retention of commercial businesses with a regional draw. Page B-14 of the Land Use Element describes this type of activity.

> "Since the immediate Florence area figures so prominently in the County's commercial activity, this region has the momentum to continue dominating construction of commercial structures. Many problems with the location and arrangement of commercial enterprises have emerged, however, especially along KY 18 and US 42. Along KY 18 in the I-75/Mall Road/Houston Road area, there are many traffic problems that can be worsened by adding commercial access points. The land surrounding the U.S. 42 area south of Florence, will experience additional growth towards the City of Union. Any commercial developments in these areas should be limited in scale and clustered to serve growing residential neighborhoods. Ideally, these commercial clusters should not function as an extension of Florence and Mall Road, but as a distinct unit serving the Union area. This should apply to the Limaburg area as well. The commercial development in this area should coordinate closely

with the projected high and medium density residential development to form a more coherent community rather than just a strip extending out of Florence."

Specifically, commercial uses in the Limaburg/KY 18 area or the project area should not be similar in nature and scale as to the type located on Mall Road.

b. In the Transportation Element of the Comprehensive Plan, there is a reference to the construction a road across Airport property to connect Mineola Pike with KY 18. Such a road would alleviate existing and potential traffic problems by providing alternate transportation routes for the public. As stated at the Public Hearing and in a letter from the Kenton County Airport Board and the Federal Aviation Administration (see attached letters), this road is not constructed nor is it planned to be constructed in the future. It is obvious that the "effective and efficient use of highway facilities" will not occur without the construction of the road.

c. The text of the Land Use Element of the Comprehensive Plan suggests that the "KY 18 corridor will be a mixture of all types of development." In addition, the proposed scale of the project and regional focus contradicts the text of the Land Use Element, which stresses that the "Mall Road area will continue to grow as a regional shopping area and its spill over onto US 42, KY 18 and Houston Road will be evident, thus, needs to be substantially controlled." Consequently, the design and location of the KY 18/I-75 Interchange, US 42/I-75 Interchange, and the new Mall Road/I-75 Interchange encourages the location of large scale retail regionally focused development to be confined to the Mall Road area. The

Comprehensive Plan discusses the importance of limiting regional retail development to select areas. The Comprehensive Plan states that "regionally oriented commercial development, should be retained to the Mall Road area." The basis for this statement is the current trend of this type of commercial development occurring there now and the introduction of the I-75/Mall Road Interchange to serve this type of development. This is well documented in the Comprehensive Plan. The Comprehensive Plan also notes the existing and potential traffic problems on KY 18 and recognizes that these problems can be worsened if regionally oriented commercial or retail uses similar to the existing retail businesses along Mall Road are built along KY 18. In addition, KY 18 is the main artery to Burlington and the existing and future planned growth of Boone County. Even though the I-75/Mall Road Interchange is planned to reduce some of the existing traffic congestion problems on KY 18 and Mall Road, it was not designed to alleviate future trips related to growth along KY 18 towards Burlington.

LAND USE COMPATIBILITY

4. The proposed project and its regional orientation at this location as stated, and depicted graphically in the applicant's traffic study is not appropriate given the site's location from I-75 (approximately 2 miles) and from I-275 (approximately 5 miles). Also, the scale of the proposed project is not compatible with the scale and impact upon the community compared with the existing businesses located along KY 18 from Houston Road to the governmental center of Burlington.

5. The proposed project and its expected traffic impact doesn't meet the design and purpose of Burlington Pike or KY 18. The proposed project would severely impact the movement of traffic from Florence to Burlington or the County's governmental center. This road primarily serves the local population of Burlington and Oakbrook Subdivision and is not intended to predominantly serve regional traffic from I-75 and I-275 that the proposed project would draw from if the retail center were constructed.

6. The applicant has failed to determine the full impact of the project since the applicant's traffic study did not include a thorough analysis of projected residential growth and business expansion adjacent to the site and along the KY 18 corridor. This growth includes but is not limited to the existing population counts and projections of Oakbrook Subdivision, the increase in residential population in Burlington, the adjoining commercial uses in the Heritage Hill Industrial Center Subdivision and the remaining industrially zoned property located to the north. Also, with the opening of Oakbrook Road from KY 18 to Pleasant Valley Road, the traffic analysis did not take into account the anticipated traffic from the new residential development along Pleasant Valley Road.

7. The scale or size of this development requires a significant amount of off-site improvements in order to accommodate the proposed development on the 43.45 acre site. These off-site improvements include but are not limited to sanitary sewer line improvements to the Oakbrook Treatment Plant, the construction of two major access roads, and the development of a detention/retention system northwest of the 43.45 acre parcel. The development of such a detention/retention

system would drastically disrupt the natural drainage pattern as specified in the Planned Development criteria. In addition this development as proposed would require the paving of a large loading/unloading and parking area on industrially zoned property located directly behind the retail center.

8. The proposed uses and the large scale of the regionally focused retail center are not compatible with the large amount of employment or industrial zoning (e.g. 250-300 acres) that is located to the north of this site. First, the development would result in an enormous traffic impact in terms of increased traffic volume on surrounding roadways and the concern of mixing of industrial and retail traffic traveling onto KY 18. Second, there is a concern for utilizing an entrance designed for major retail use and at the same time serving a large industrial park.

9. The proposed project is not compatible with the adjoining properties to the south and east. Located to the south is a large residential community (Oakbrook—approximately 1,800 dwelling units and over 6,000 residents at full build out) within 500 feet of this project. Located to the east are approved automotive related uses. These uses were adopted as part of a zone change request prior to the adoption of the 1986 Comprehensive Plan. Unlike the applicant's submitted Concept Development Plan, these uses are not predominately regional draws and they are not developed with the same intensity as the project site. Therefore, they are compatible with the adjoining residential land uses. Automotive related use traffic is usually more dispersed during a 24 hour period, and obviously the scale of these individual uses are different in terms of community impact than the applicant's proposed project.

10. The uses that are proposed by the applicant are generally located near an interstate with an adequate road system in place to handle anticipated traffic. In addition, the underlying zone or the C-2 zoning district allows other retail and offices uses that are not normally high traffic generators. Those type of uses are presently located along the KY 18 corridor from Florence to Burlington. These uses serve the local population as intended and are indicated in the Comprehensive Plan. The submitted Concept Development Plan and proposed uses do not address the Comprehensive Plan's desire to encourage the retail, office and service related needs of the Oakbrook and Burlington populations, but rather the predominant needs of a regional population.

TRAFFIC

11. The applicant's traffic study does not fully address the development's impact on the existing roadway system.

    a. The applicant's study failed to evaluate the impact of the additional retail space in the proposed center and the out-lots, which would include an additional 240,000 square feet as stated in the applicant's Traffic Impact Analysis planned for the site. The study's conclusions were based upon Phase I of the development or just 337,000 square feet of retail use.

    b. The applicant's study does not evaluate the associated traffic from other developments in the area such as the expansion of Oakbrook Subdivision and Heritage Hill Industrial Center and other developments than have been approved. These future developments should be included in order to make the com-

plete analysis of the traffic impact on the community.

c. The applicant's study includes in Phase II traffic generated from 500,000 square feet of industrial use on the industrially zoned property to the north. This figure may be under estimated given the potential development of 250-300 acres under the current zoning regulations would allow up to 6,250,000 squ square feet of industrial use.

d. The applicant assumes that 50-60 percent of all traffic at the KY 18/I-75 interchange will use the new interchange for Mall Road. The conclusion of OKI, who prepared the study for the new ramps, is that a 30 percent reduction of traffic on KY 18 is expected. Further, the concern is that any increase in the capacity of KY 18 is protected for future growth of Boone County.

e. The applicant assumed the proposed airport road would handle 39 percent of the traffic generated by the proposed development. However, the applicant does not give an alternative if the airport road is not built, or where the 39 percent of the traffic will be routed. The Committee believes that KY 18 will be main road system for this proposed development and thus be most impacted.

The TIA analysis presented by the applicant therefore has not significantly analyzed the potential impact of the development on area roadways.

12. The applicant's Phase I conclusions of their traffic study were incomplete in terms of evaluating the impact of the entire retail development. By adding Phase II traffic, the applicant's traffic study showed that the development will reduce the LOS (level of service) of

intersections to unacceptable levels, as shown in Table 2. (see attached table) Further, these LOS calculations do not take account the additional future traffic generated by surrounding developments as discussed on Item 11.

13. The proposed design of the eastern access driveway (located off site or outside the 43.45 acre parcel) will not adequately handle the anticipated commercial traffic from the Boone Crossing development and future industrial traffic from the property immediately north of 43.45 acre parcel and Heritage Hill Industrial Center Subdivision.
14. The type of development being proposed should be located within close proximity of an interstate system and on an adequate transportation network with limited access in order to move a large amount of local and regional traffic efficiently. If this type of development was located at this site the traffic associated with this regional retail center would greatly affect the efficiency of the major thoroughfare from Florence to Burlington (KY 18) and KY 237 from the Camp Ernst area to Hebron.

CONCLUSION

The Committee would like to state that the Boone Crossings Concept Development Plan project was evaluated from a land use standpoint, which is the role of a Planning Commission. We recognize that this project would have a large economic impact on the community but then any project of this magnitude will have a large economic impact in terms of the number of jobs created and the taxes generated. The Boone County Planning Commission is charged with reviewing land use considerations, such as compatibility of the project with adjoining land uses, ade-

quacy of roads, access, utilities, signage, and public visibility for it is the land use impact which is ultimately felt by the community.

This site has many development possibilities, however, we do not believe that this is an appropriate use based on the information stated and for the reasons listed above. Further, we are of the opinion that this use could occur in Boone County if properly located.

/s/ Barry Neltner
Barry Neltner, Chairman

/s/ Larry Barnett
Larry Barnett

/s/ Fred Burch
Fred Burch

Phil Damstrom

/s/ Rector Jones
Rector Jones

/s/ Carol Smith
Carol Smith

BN:kat

APPENDIX F

COMMITTEE REPORT

TO: Boone County Planning Commission

FROM: Barry Neltner, Chairman

DATE: October 3, 1990

RE: Request of *Turfway Park Racing Association, Inc. (Owner)* for *Carroll Properties, Inc. (applicant)* for a Zoning Map Amendment on a +123.1 acre site located off both sides of the Houston Road Extension, both in Florence and in unincorporated Boone County, Kentucky. The request is to rezone the site from Office Two/Planned Development (O-2/PD), Suburban Residential Two/Planned Development (SR-2/PD), Public Facilities/Planned Development (PF/PD) and Recreation/Planned Development (R/PD), to Commercial Two/Planned Development (C-2/PD) in order to allow a mixed use office/commercial development and an entertainment and exhibition facility.

REMARKS:

We, the Committee, recommend approval of the above request based upon the following findings of fact and subject to the following conditions.

FINDINGS OF FACT

1. The existing zoning classification of the site, Office Two/Planned Development (O-2/PD), Suburban Residential Two/Planned Development (SR-2/PD), Public Facilities/Planned Development (PF/PD), and Recreation/Planned Development (R/PD), is inappro-

priate and the proposed zoning classification, Commercial Two/Planned Development (C-2/PD), is more appropriate due to the fact that the existing Houston Road Extension divides the site and, therefore, makes it less conducive for significant residential and office development as previously approved. Also, part of the Houston Road Extension is completed and represents a physical improvement already in place since the adoption of the *Houston-Donaldson Study*. In addition, some of the uses proposed, for example, the hotel use and the entertainment/mini-convention center use, are compatible with adjoining land uses and appropriate due to the presence of Turfway Park, a major recreational facility in Boone County and in Northern Kentucky.

2. The proposed uses as described on the submitted Concept Development Plan and subject to the conditions listed below generally meet the goals and objectives of Planned Development (as stated in Article 15 of the *Boone County Zoning Regulations*). In addition, some of the proposed uses will help maintain the employment character of the areas as outlined in the *Houston-Donaldson Study*. These uses are service related and are designated to protect the employment character of the area. KPC

3. The proposed uses and zoning are appropriate since the applicant has agreed to make significant roadway and utility improvements on and off the site and has agreed to phase the development. Also, the applicant has agreed to work with other property owners in the area, the Boone County Planning Commission, the City of Florence, and the Boone County Fiscal Court to help remedy the existing and forecasted traffic congestion around the I-75/

Turfway Road Interchange. These actions are in accordance with the *Houston-Donaldson Study*, which was designed to correlate Study area development with infrastructure improvements.

CONDITIONS

The applicant is being asked to agree to include these items as part of the Concept Development Plan in order to clarify the plan as presented at the August 22, 1990, Business Meeting. Further, these conditions are intended to clarify the suitable uses and development for the presented plan.

1. The applicant shall agree not to take occupancy of the proposed Bigg's building and enclosed mall until the construction of the Houston Road Extension to Donaldston Highway is completed and open to the public. The three proposed uses along Turfway Road Extension to Donaldson Highway. The applicant shall further agree not to take occupancy of any other new building until the construction of the Houston Road Extension is substantially underway.
2. The applicant shall make the necessary road improvements to the I-75 southbound exit ramp and Houston Road Extension as stated in the applicant's traffic study, application and the correspondence from the Kentucky Transportation Cabinet (dated August 22, 1990).
3. If deemed appropriate by the Boone County Planning Commission, the Kentucky Transportation Cabinet, and St. Luke West Hospital, the southern access to Parcel B shall be relocated north on the Houston Road and Turfway intersection. Such access should be located opposite from a new St. Luke West Hospital entrance.

4. The applicant will be required to share access from Parcel A to the adjoining properties to the north and south. Due to the planned shared access, the proposed ring road shall be designed to accommodate future traffic from the adjoining properties.
5. The proposed curb cut off Turfway Road serving Parcel B shall be limited to right turn in and out.
6. The proposed curb cut off the Houston Road Extension serving the major retail center on Parcel B shall be eliminated.
7. The proposed curb cut off the Houston Road Extension serving Parcel A and located closest to the northern property line shall be eliminated.
8. The applicant shall be required to negotiate with city/county officials to relocate all necessary utilities and to provide all necessary easements.
9. The applicant shall be required to pursue development of the proposed Entertainment/Mini-Convention Center facility in the first phase of development.
10. The applicant shall be required to build the proposed uses in accordance with the submitted Concept Development Plan presented at the August 22, 1990, Public Hearing with the exception of the proposed outlots on Parcel A. The outlot area shall be restricted to a maximum number of nine outlots with a total building square footage not to exceed 120,000 square feet. The proposed mix of office and commercial use will be 50% office and 50% commercial use for the outlot area.
11. The proposed Bigg's building and other associated anchor stores shall be moved approximately 50 feet northwest from the proposed location on the Concept Development Plan in order to expand the visual

buffer from I-75. Consequently, the proposed buildings will be at a minimum 150 feet from the I-75 property line.

12. All proposed buildings shall be subject to the design review procedure and standards as stated in the *Houston-Donaldson Study*. In addition, all roof equipment and loading areas from the proposed retail building along I-75 shall be sufficiently screened from public view (I-75) with the use of preserving existing trees, new landscaping plant material, decorative building materials, and decorative retaining walls. Water features shall be required along I-75 and the Houston Road Extension as part of this development. All building design shall be consistent and in harmony with the *Houston-Donaldson Study*.

BN stand within

13. ~~Generally~~, The existing trees located ~~approximately~~ 75 feet from the eastern property line shall not be removed. On the northern and southern property lines, all existing vegetation shall remain at a minimum 50 feet from each property line. Additional vegetation may be required to be preserved adjacent to the St. Luke West property at subsequent reviews. All trees to be removed on the site shall be identified on a subsequent development plan and reviewed and approved by the Boone County Planning Commission prior to any removal. The undisturbed areas shall be marked in the field and inspected by the Boone County Planning Commission.

14. The proposed development shall have at a minimum 22% green space. Each phase of the development submitted for review shall include calculations of

green space area. In general, landscaping plans for the project shall include the following:

a) Provide planting islands between every 10 to 15 spaces to avoid long rows of parked cars. The size should be a minimum of nine feet wide to allow for an adequate planting area. Each of these planting islands should provide at least one shade tree having a clear trunk height of at least six feet. For code required parking, one tree and three shrubs are to be utilized per 15 spaces.

b) Provide eight-foot wide landscape strips for every four rows of parking, or large planting islands at the ends of parking rows.

c) In addition, canopy tree plantings along the Houston Road Extension and other public streets of the proposed development shall be planted along with earthen berms as part of the application.

15. The applicant agrees to work with the City of Florence, Boone County, and area property owners and developers in arriving at a solution to the existing and forecasted traffic congestion at the Turfway Road/I-75 Interchange.

16. The applicant agrees to pay for the traffic signals which will be used to enter and exit the Bigg's site. The applicant shall negotiate with the Kentucky Transportation Cabinet and St. Luke West Hospital to place a traffic signal at the first entrance of the development off the Houston Road Extension.

This Committee recommendation upon approval by the Boone County Planning Commission is recommended to be forwarded to the City of Florence and the Boone County Fiscal Court. In addition, the Committee is recommending that the text of the *Houston-Donaldson*

Study and the *1990 Boone County Comprehensive Plan* be amended accordingly.

A copy of the Public Hearing minutes accompanies the findings and recommendation serving as a summary of the evidence and testimony presented by the proponents and opponents of this request.

/s/ Barry Neltner
Barry Neltner, Chairman

Rector Jones

/s/ Fred Burch
Fred Burch

/s/ Carol Smith
Carol Smith

/s/ Phil Damstrom
Phil Damstrom

Larry Barnett

Lawrence Collins

BN:mcb

CITY OF FLORENCE [SEAL]
Betsy R. Conrad
City Clerk

January 8, 1991

Mr. William R. Viox, Chairman
Boone County Planning Commission
P.O. Box 596
Burlington, KY 41005

Dear Mr. Viox:

Please be advised that Florence City Council declined to take action on the Planning Commission's recommendation regarding the request of **Turfway Park Racing Association, Inc. (owners) for Carroll Properties, Inc. (applicant)**, through your Resolution R-37-90. It is our understanding that the zoning map amendment stands approved as recommended in this instance.

Sincerely,

/s/ Betsy
Betsy R. Conrad

Copy: Bruce Janken, City Coordinator

Mailing Address:
P.O. Box 457 · Florence, Kentucky 41022-0457
Street Address:
7431 U.S. Highway 42 · Florence, Kentucky 41042
(606) 371-5495

APPENDIX G

AFFIDAVIT OF MIKE PHILLIPS

Comes now Mike Phillips and after being duly cautioned and sworn, states as follows:

My name is Mike Phillips, and I hold the position of Director of Real Estate of Hyper Shoppes Real Estate Company, Inc. Our organization is the real estate development arm of Biggs, a major regional retail developer. During 1989 and the early part of 1990 our company had a contract with Erpenbeck Commercial Enterprises, Inc., to purchase a parcel of land containing approximately 43 acres along Kentucky 18 in Boone County, Kentucky. That contract had a number of conditions and for various reasons set forth below, our company cancelled or terminated this contract with Erpenbeck Commercial Enterprises on or about January 11, 1990.

The parcel that was the subject of that contract had a zoning classification requiring review and approval of a concept development plan before it could be developed for a Biggs store. That approval had to come through the Boone County Fiscal Court and this approval, along with other conditions, was a requirement of the contract before our company would purchase the property. Under our contract, Erpenbeck Commercial Enterprises, Inc., was to be primarily responsible for preparation of an application with a concept development plan. Our company was responsible for some of the costs in the preparation of that plan, and before we could be obligated under our contract we had to approve that plan submitted to the Boone County zoning authorities.

In early December, 1989, the Boone County Planning Commission conducted a public hearing on the development plan submitted by Erpenbeck Commercial Enter-

prises, Inc. This plan as submitted to the Boone County authorities was not acceptable to our company and I personally informed Ray Erpenbeck of Erpenbeck Commercial Enterprises, Inc., that it was not acceptable to us. There were various problems with that plan, as we viewed it, most of which involved the transportation facilities or roadways to the site.

As a regional retailer, it is very important for us to have good access to interstate systems to allow regional customers access to our site. Erpenbeck Commercial Enterprises, Inc., had informed us that they could provide this access through a public use road through Airport owned property to the north of the Kentucky 18 location. This public use road would have close access to the interstate systems for regional customers from the north and west of the location. Without this type of access road to the site, we would not have been interested in pursuing actual purchase of the Kentucky 18 location.

Another major factor to us concerned the traffic study or design internally within the site as well as planned access from Kentucky 18. More specifically, regional traffic accessing our site from the west along Kentucky 18 did not have adequate or acceptable access to our location. Without acceptable access facilities for this eastbound regional traffic from the west, the site would not have been acceptable to us for purchase. This traffic study and design was part of the Erpenbeck submitted development plan.

Another important factor to our company was the public reaction opposing the Kentucky 18 site as a location for our company. It is our policy not to go where we are not wanted at any particular location.

Regarding internal traffic on site as reflected in the development plan submitted by Erpenbeck Commercial Enterprises, Inc., it was not designed in a way that was acceptable to our company. I informed Ray Erpenbeck, prior to its submittal, that we wanted the structure to be located along the rear property boundary line of the approximate 43 acres that was the subject of the contract. I informed Ray Erpenbeck that unless the structure was so located, we would not close or purchase the property. The importance to us is to have the structure located along the back boundary for this site so that we would have sufficient space to align parking and internal traffic flow in the way and manner our company prefers.

For all of these reasons, I informed Ray Erpenbeck that the concept development plan as submitted to the Boone County authorities was not acceptable to our company. Even if that development plan had been approved all the way through the Boone County Fiscal Court, our company would not have purchased or developed the property for a Biggs store.

In mid-February, I wrote a letter to Gerald Newton, Director of the Boone County Planning Commission, to schedule a meeting. In that letter I informed Mr. Newton that our company had terminated its contract on the Kentucky 18 property involving the Erpenbeck Commercial Enterprises proposal. My purpose in wanting to meet with Mr. Newton, as I expressed in that letter, was to discuss other locations or sites in Boone County that my company felt were more appropriate for Biggs. A meeting was scheduled for March 8, 1990, but that meeting never occurred because of the lawsuit filed by Erpenbeck Commercial Services and Enterprise VI.

After our company terminated its contract with Erpenbeck Commercial Enterprises, we received num-

erous proposals regarding other locations. However, none of these proposals came from the Boone County Planning Commission, its staff or its members. These proposals were either from property owners, real estate developers or real estate brokers from all over Southern Ohio and Kentucky. Some of these proposals came from Lexington and Louisville, Kentucky. Among the proposals sent to us was a proposal from Carroll Properties, Inc.

After meeting with Carroll Properties, Inc., and reviewing a potential site, our company entered into a contract, with several conditions, with Carroll Properties, Inc. It was only after our company decided on the Carroll Properties location that we ever met with Jerry Newton of the Boone County Planning Commission. Mr. Newton never expressed any opinion as to whether or not our project could be approved at the Carroll Properties site. He merely informed us of the procedures and what may be important factors to any review and approval for the location. Again, our company never met with Jerry Newton or the Boone County Planning Commission, its staff or members, regarding selection of any site until after we had already focused and decided on the Carroll Properties location.

The significance of the Carroll Properties location to our company was its accessibility to an interstate system. As with the Kentucky 18 site, our company anticipates that the vast majority of our regional retail customers will come from the north. We also wanted our site to have access to the west. A major consideration with the Carroll Properties contract is that we have no obligation to close or purchase until the Houston Road extension to Donaldson Highway is completed and open to the public. Another major consideration is the improvement to the

interstate highway I-75 and Donaldson Road interchange. Without this accessibility to the northerly and westerly regional retail customers, our company would not have been interested in the Carroll Properties location for a Biggs store.

Among the proposals our company received after terminating our contract with Erpenbeck Commercial Enterprises was a contact from the owner and developer of property located along Houston Road, south of its intersection with Turfway Road. That developer is Buchanan Development Corporation and the property is owned by N.K. Management, Inc. That property was not acceptable to our company for a Biggs store because of its limited accessibility to regional customers from the north. These customers would be using interstate highway I-75 and the ability of those customers from the north to access I-75 back to the north upon leaving that site is very restricted at the Turfway Road interchange with interstate highway I-75 and was not acceptable to us. Likewise, the interchange of I-75 and Kentucky 18 for the northbound traffic was viewed by our company as unacceptable and it is these two interchanges that would have to serve either the Buchanan location or the site of the Erpenbeck Commercial Services Project on Kentucky 18 west of Zig Zag Road.

CONCLUSION

To conclude, even if the Erpenbeck Commercial Services concept development plan as presented to the Boone County Planning Commission had been approved through the Boone County Fiscal Court, our company would not have purchased the property. The conditions in our contract with Erpenbeck Commercial Enter-

prises were not and would not have been met to our satisfaction in a timely manner.

Dated this 17th day of February, 1991.

/s/ MIke Phillips
Mike Phillips

State of Ohio
County of Clermont

This Affidavit was subscribed, sworn to and acknowledged before me this 18th day of February, 1991, by Mike Phillips.

/s/Betty K. Carter
NOTARY PUBLIC, State of Ohio
Betty K. Carter

My Commission Expires:
March 30, 1995

APPENDIX H

[Entered 12-30-92]
PAT GUTZEIT, CLERK
BOONE CIRCUIT/DISTRICT COURTS
BY /s/ D.C.

BOONE CIRCUIT COURT
CONSOLIDATED CIVIL ACTION
NOS. 90-CI-174 and 90-CI-175

ENTERPRISE VI, ET AL — APPELLANTS/PLAINTIFFS

VS.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/DEFENDANTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC., ET AL — APPELLANTS/PLAINTIFFS

VS.

BOONE COUNTY FISCAL COURT, ET AL — APPELLEES/DEFENDANTS

ORDER OVERRULING MOTION
TO ALTER, AMEND AND VACATE

* * * * * * * * * * *

Plaintiff, Erpenbeck Commercial Enterprises, Inc., having moved to alter, amend and vacate this Court's Opinion and Order entered on November 20, 1992, this Motion being heard on December 22, 1992, with said Plaintiff's counsel present (Alex Talbott) and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that said Plaintiff's Motion to Alter, Amend and Vacate is overruled.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that Plaintiff's Motion to file as part of the record the proposed Opinion and Order tendered by Defendants is overruled. For explanation, the Court states as follows:

The Opinion and Order entered on November 20, 1992, granted Defendants Summary Judgment. The Court prior to rendering that Opinion and Order requested all parties to tender proposed Opinions and Orders for the Court's review. These proposed Opinions and Orders assisted the Court to focus on the issues contained within pending motions. The Court also had before it over 250 pages of memoranda supporting these pending motions and lengthy oral argument with representation by all parties had occurred.

None of the Plaintiffs filed objections or opposed this procedure, and at the hearing on this Motion to Vacate, Mr. Talbott confirmed that he had no objection then, nor opposition now to that procedure. Counsel for Enterprise VI did not tender an Opinion and Order, and has not filed any Motion to Vacate in this case. Moreover, counsel for Enterprise VI filed no objections or opposition to submittal of proposed Opinions and Orders.

The Opinion and Order granting Defendants Summary Judgment is not a blind entry or verbatim acceptance of Defendants' tendered Opinion and Order. This Court, after becoming very familiar with the pending motions and supporting memoranda submitted by all parties and hearing the lengthy oral argument, rendered the Opinion and Order as its decision on November 20, 1992. This

Opinion and Order as entered contains several additions made by this Court and is this Court's independent decision.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED, that, while inappropriate for Plaintiffs' counsel to attach a copy of its tendered Opinion and Order to its Motion, making it improperly part of this record, this Court does not direct that it be expunged.

/s/ [Illegible]
JUDGE, BOONE CIRCUIT COURT

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